APPENDIX A — AMENDED OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED JULY 15, 2002, AMENDED SEPTEMBER 9, 2002

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 01-17023
01-17433
02-15282

D.C. No.
CV-00-00506-WBS

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. — U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA INSURANCE COMPANY; and CONSTITUTION INSURANCE CORP.,

Plaintiffs-Appellees-Cross-Appellants-Plaintiffs-Appellants,

v.

HARRY W. LOW, in his capacity as the COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA,

Defendant-Appellant-Cross-Appellee-Defendant-Appellee.

Appendix A

D.C. No.
CV-00-00875-WBS

ASSICURAZIONI GENERALI,

Plaintiff-Appellee-Cross-Appellant-Plaintiff-Appellant,

v.

HARRY W. LOW, individually, and in his capacity as the INSURANCE COMMISSIONER for the STATE OF CALIFORNIA,

Defendant-Appellant-Cross-Appellee-Defendant-Appellee.

D.C. No.
CV-00-00779-WBS

WINTERTHUR INTERNATIONAL AMERICA INSURANCE COMPANY, WINTERTHUR INTERNATIONAL AMERICA UNDERWRITERS INSURANCE COMPANY; GENERAL CASUALTY COMPANY OF WISCONSIN; REGENT INSURANCE COMPANY; REPUBLIC INSURANCE COMPANY; SOUTHERN INSURANCE COMPANY, UNIGARD INDEMNITY COMPANY; UNIGARD INSURANCE COMPANY; and BLUE RIDGE INSURANCE COMPANY,

Plaintiffs-Appellees-Cross-Appellants-Plaintiffs-Appellants,

v.

Appendix A

HARRY W. LOW, in his capacity as INSURANCE COMMISSIONER for the STATE OF CALIFORNIA,

Defendant-Appellant-Cross-Appellee-Defendant-Appellee.

D.C. No.
CV-00-00613-WBS

AMERICAN INSURANCE ASSOCIATION and AMERICAN RE-INSURANCE COMPANY,

Plaintiffs-Appellees-Cross-Appellants-Plaintiffs-Appellants,

v.

HARRY W. LOW, in his capacity as INSURANCE COMMISSIONER for the STATE OF CALIFORNIA,

Defendant-Appellant-Cross-Appellee-Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted
May 8, 2002—Pasadena, California

Filed July 15, 2002
Amended September 9, 2002

Appendix A

Before: Alfred T. Goodwin, Susan P. Graber, and Richard A. Paez, Circuit Judges.

Opinion by Judge Graber

OPINION

GRABER, Circuit Judge.

This case comes before us for the second time. Plaintiffs, which are various insurance companies and a trade association of insurance companies, brought the present action to enjoin Defendant Harry W. Low, the Insurance Commissioner of the State of California (Commissioner), from enforcing a California statute requiring disclosure of information about Holocaust-era insurance policies. The district court permanently enjoined enforcement of the statute. The main question for decision is this: May California constitutionally require the disclosure of insurance claims-related information by an insurance company that is licensed to do business in California even though the required information may be in the hands of a related entity that is located in a foreign country? We answer that question "yes" and, accordingly, reverse the judgment of the district court and vacate the injunction.

FACTUAL AND PROCEDURAL HISTORY

The Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 (HVIRA), requires any insurer doing business in California that sold insurance policies to persons in Europe that were in effect between

the years 1920 and 1945 (Holocaust-era policies) to file certain information about those policies with the Commissioner.[1] Cal. Ins. Code § 13804(a). The reporting requirement also applies to insurance companies that do business in California and are "related" to a company that sold Holocaust-era policies, even if the relationship arose after the policies were issued. *Id.* A "related company" is defined as any "parent, subsidiary, reinsurer,[2] successor in interest, managing general agent, or affiliate company of the insurer." *Id.* § 13802(b). The statute instructs the Commissioner to store the information in a "Holocaust Era Insurance Registry," which is to be made available to the public. *Id.* § 13803. The Commissioner "shall suspend the certificate of authority to conduct insurance business

1. The information that the insurance companies must provide is: (1) the number of Holocaust-era insurance policies; (2) the holder, beneficiary, and current status of each policy; and (3) the city of origin, domicile, or address for each policyholder listed in the policies. Cal. Ins. Code § 13804(a)(1)-(3). In addition, the insurer must certify that: (1) the proceeds of the policies were paid; or (2) the beneficiaries or heirs could not, after diligent search, be located, and the proceeds were distributed to Holocaust survivors or charities; or (3) a court of law has certified a plan for the distribution of the proceeds; or (4) the proceeds have not been distributed. The implementing regulations state that, if "the insurer states that it has no actual policies to report because the records are no longer in the possession of the insurer or its related company(ies), it shall provide a complete explanation of that statement." Cal. Code Regs. tit. 10, § 2278.2(a). Any insurer who knowingly files false information is subject to a penalty not to exceed $5,000. Cal. Ins. Code § 13805.

2. By regulation, the meaning of "reinsurer" is limited to directly related companies. Cal. Code Regs. tit. 10, § 2278.1(i).

in the state of any insurer that fails to comply" with the reporting requirements, until the insurer complies. *Id.* § 13806.

Plaintiffs filed four separate actions in which they sought to enjoin the enforcement of HVIRA. The original complaints were filed by

> (1) Gerling Global Reinsurance Corp. of America and its affiliates (collectively, Gerling), who are, according to their complaint, "arguably 'affiliated' [with] . . . or 'related [to]' " two German insurers that issued Holocaust-era policies; (2) American Insurance Association (AIA), a nonprofit trade association of insurers whose member-insurers are required to report under HVIRA, and American Reinsurance Company, a wholly owned subsidiary of a German corporation "that has investment interests in European insurance companies that do issue insurance policies"; (3) Winterthur International America Insurance Company, its affiliates, and numerous other insurance and underwriting companies (collectively, Winterthur), who are "arguably 'related companies' . . . with more than forty insurance companies currently located in Europe"; and (4) Assicurazioni Generali (Generali), an Italian insurance company that issued Holocaust-era policies and currently does business in California.

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Gerling Global Reins. Corp. of Am. v. Low, 240 F.3d 739, 742 (9th Cir. 2001) (*Gerling I*), *cert. dismissed,* 122 S. Ct. 1907 (2002).

Plaintiffs sought declaratory and injunctive relief, claiming that HVIRA violated a number of constitutional provisions. Additionally, Plaintiff Gerling asked the court to review two statutes that were enacted at the same time as HVIRA: (1) California Code of Civil Procedure § 354.5, which allows California residents to bring claims for the payment of Holocaust-era insurance policies and extends the statute of limitations on such claims until December 31, 2010; and (2) California Insurance Code § 790.15, which instructs the Commissioner to suspend the certificate of authority of any insurer who has failed to pay on valid Holocaust-era policies. The Commissioner, in his motion to dismiss, argued that Gerling did not have standing to challenge these two additional statutes. The district court granted the motion to dismiss the additional challenges because Gerling had not established an imminent threat of prosecution. Gerling did not appeal that ruling. *Gerling I,* 240 F.3d at 742-43.

The district court issued an order granting Plaintiffs' motions for preliminary injunction and enjoined enforcement of HVIRA and its implementing regulations pending the entry of final judgments. The court based its preliminary injunction on a determination that Plaintiffs had established that (1) they probably would succeed under the foreign affairs doctrine and the Commerce Clause, and (2) enforcement of the statute would cause Plaintiffs irreparable harm. The district court did not reach Plaintiffs' other constitutional challenges to the statute.

The Commissioner appealed the district court's decision. We rejected Plaintiffs' Commerce Clause and foreign affairs doctrine challenges to the statute as a matter of law. *Id.* at 743, 751. However, we left the preliminary injunction in place "in order to give the district court an opportunity to consider whether Plaintiffs are likely to succeed on the merits" of their due process claims. *Id.* at 754.

On remand, the district court conducted further proceedings and ultimately held that the statute violates Plaintiffs' right to procedural due process by "mandating license suspension for non-performance of what may be impossible tasks without allowing for a meaningful hearing." *Gerling Global Reins. Corp. of Am. v. Low,* 186 F. Supp. 2d 1099, 1113 (E.D. Cal. 2001) (*Gerling II*). The court granted Plaintiffs' summary judgment motion, denied the Commissioner's summary judgment motion, and permanently enjoined the Commissioner from enforcing the statute. *Id.* The Commissioner filed a timely notice of appeal. Plaintiffs timely cross-appealed the district court's denial of their alternative grounds for summary judgment.

Plaintiffs moved for a determination that they were entitled to attorney fees as prevailing parties under 42 U.S.C. §§ 1983, 1988. The district court denied their motion, and Plaintiffs timely appealed that decision as well.

Appendix A

STANDARD OF REVIEW

We review de novo the district court's grant or denial of summary judgment. *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1164 (9th Cir. 2000). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact and whether the district court properly applied the relevant substantive law. *Id.* We also review de novo the constitutionality of a statute. *Dittman v. California,* 191 F.3d 1020, 1024-25 (9th Cir. 1999).

LEGISLATIVE JURISDICTION

Key to Plaintiffs' position in this appeal is the assertion that the California legislature exceeded its legislative authority and, by doing so, violated Plaintiffs' due process rights. Specifically, Plaintiffs argue that HVIRA regulates extraterritorially, that is, imposes requirements on entities that are located outside California's borders and alters the substance of insurance contracts executed outside the state. We are not persuaded.

We begin from the premise that a state legislature possesses nearly plenary power to regulate state-licensed businesses and to seek information from entities that are licensed to do business within that state. "The wisdom of [a licensing disclosure] requirement is not for us to judge. For in the end, 'it is for the legislature, not the courts, to balance the advantages and disadvantages of . . . new requirement[s].' " *Dittman,* 191 F.3d at 1032 (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-

88 (1955)) (second alteration in original). Further, we "will not presume that information sought by state officials for which there is a legitimate purpose will be put to an unconstitutional use." *Lewis v. Younger,* 653 F.2d 1258, 1260 (9th Cir. 1980).

We next emphasize what HVIRA does and does not do. We already have cautioned that Plaintiffs' argument that HVIRA "attempts to regulate the decision making authority of European insurance companies to pay or not to pay claims on European policies . . . mischaracterizes HVIRA as a matter of law." *Gerling I,* 240 F.3d at 745 (internal quotation marks omitted). We have explained that HVIRA is a reporting statute which, "by its terms, does not regulate 'the decision making authority of European insurance companies to pay or not to pay claims on European policies' in any way." *Id.* (internal quotation marks omitted). Further, we have held that the statute "is a California insurance regulation of California insurance companies" that "requires California companies only to *provide information* about Holocaust-era insurance policies that they (or any of their affiliates) issued." *Id.* at 746, 745; *see id.* at 745 (distinguishing HVIRA from "state laws [that] sought to regulate directly the conduct of an insurer in another jurisdiction. By contrast, HVIRA seeks only to obtain information about conduct in another jurisdiction, without affecting directly any of that conduct").

Plaintiffs rely heavily on *Gerling Global Reinsurance Corp. of America v. Gallagher,* 267 F.3d 1228 (11th Cir. 2001), in which the Eleventh Circuit held that a Florida statute similar to HVIRA violated due process because it was enacted in excess of the state's legislative jurisdiction. We find that case uninstructive in analyzing the reach of HVIRA, for two reasons.

First, *Gallagher* is materially distinguishable. In *Gallagher,* information was demanded directly from both local and foreign entities,[3] while here information is sought *only* from the California licensees.

Further, the *Gallagher* court held that the sole purpose of the Florida statute was the payment of Holocaust-era claims and that no other justification for the statute, such as the Florida licensees' fitness to do business, had been properly advanced. *Id.* at 1239-40. By contrast, we construe HVIRA to have several legitimate purposes.[4]

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3. Florida's insurance commissioner issued subpoenas addressed to Florida-licensed insurers *and their foreign affiliates,* demanding disclosure of a wide range of documents. *Gallagher,* 267 F.3d at 1231.

4. The Eleventh Circuit acknowledged the importance to its analysis of the Florida statute's purpose:

> We do not mean to say that the Commissioner is necessarily without authority to investigate and obtain records regarding the practices of affiliates of Florida insurers. On the contrary, separate provisions of the Florida Insurance Code may well give the Commissioner authority to conduct far-reaching inquiries into the affairs of a Florida insurer's affiliates in order to determine whether the Florida insurer is fit to do business in the state. . . .
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> We offer no view as to whether these provisions (which the Commissioner does not even invoke) might have authorized the subpoenas served by the Commissioner in this case; nor do we offer any view

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Additionally, as we have noted, the only statute at issue in this appeal is a reporting statute. Proposed challenges to other laws that alter the statute of limitations and provide a forum for substantive claims were dismissed for lack of standing. By contrast, the statute considered in *Gallagher* contained both disclosure and substantive elements. *See id.* at 1229, 1239. Although the Eleventh Circuit based its ruling on only the disclosure provisions, *id.* at 1234, the difference in the structure of the two statutes still is meaningful. The California legislature already made the policy judgment that the reporting requirement is severable and has independent force. Thus we need not guess whether the reporting requirement is merely ancillary to substantive regulations directly affecting out-of-state entities and transactions. *Cf. id.* at 1239 ("[T]he Legislature's inclusion of the claims recovery provisions in the same statute *itself* belies any suggestion that the reporting provisions are really intended to protect ordinary policyholders by monitoring the exposure and financial sufficiency of Florida insurers.").

(Cont'd)

> regarding the constitutionality of invoking those provisions in this context. Certainly these provisions fit more closely with the purpose *now* asserted by the Commissioner, and that fact may well affect the Due Process analysis. But the critical point is that *these* subpoenas were issued in furtherance of an investigation under the Holocaust Victims Insurance Act, and *that* Act is not concerned with the financial stability or fitness of insurers doing business in Florida. . . .

Gallagher, 267 F.3d at 1240.

The second reason why we decline to adopt the reasoning of *Gallagher* is that it offers an interpretation of the legislative jurisdiction doctrine that conflicts with the relevant precedents, at least insofar as a statute like HVIRA is concerned. The legislative jurisdiction cases appear to fall into three different categories, each proscribing a certain type of legislative enactment, and HVIRA falls into none of them. We will discuss these three categories in turn.

A. *Regulation of Out-of-State Entities on the Basis of Incidental In-State Contacts*

Several cases have held that the legislative jurisdiction doctrine bars states from directly regulating out-of-state entities unless those entities and their regulated activities have minimum contacts with the state. The analysis in these cases often parallels the analysis of whether the state would have personal jurisdiction over a party in the context of a judicial proceeding.

Thus, for instance, in *Adventure Communications, Inc. v. Kentucky Registry of Election Finance*, 191 F.3d 429, 432 (4th Cir. 1999), the Fourth Circuit applied the legislative jurisdiction doctrine to a Kentucky statute regulating out-of-state television and radio broadcasters who sold advertising time to Kentucky gubernatorial candidates. Finding that the requisite minimum contacts existed between the state, the broadcasters, and their campaign-advertising practices, the court held that Kentucky's statute did not violate due process. *Id.* at 437-38.

Similarly, in *American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County,* 221 F.3d 1211, 1213 (11th Cir. 2000) (per curiam), the Eleventh Circuit applied the legislative jurisdiction doctrine to a county ordinance requiring persons, wherever located, who solicited charitable contributions within the county to register with the county before performing services for their clients. The ordinance also placed limitations on the ability of outside solicitors and consultants to raise funds in the county for organizations that had not themselves registered. *Id.* The court, finding that it had insufficient facts with which to perform the "minimum contacts" analysis, remanded the case to the district court for further development of the record. *Id.* at 1215-16.

Finally, in *Quill Corp. v. North Dakota,* 504 U.S. 298, 301-02 (1992), the Supreme Court considered the validity of a use tax imposed by North Dakota on out-of-state mail-order vendors who sold goods to North Dakota residents for consumption within the state. The Court found that the requisite minimum contacts existed between the state and the regulated vendors, so that the statute did not exceed North Dakota's legislative jurisdiction. *Id.* at 308.

As we have explained previously, HVIRA cannot properly be regarded as a statute that directly regulates foreign insurance companies. Although Plaintiffs complain that the practical effect of the statute is to force foreign companies to search through their records and compile the requested information, this characterization ignores a number of relevant facts. HVIRA places no *direct* demands on these foreign entities and does not impose any sanctions on *them*

for noncompliance.[5] Thus, both the demands and the sanctions of the statute fall solely on California insurers. Should the foreign company desire not to help a California affiliate comply with HVIRA, it need not do so. In fact, Plaintiffs themselves highlight this feature of the statute when they argue that they cannot comply due to their lack of "control" over the requested information.

Additionally, California insurers can comply with the statute even in the absence of assistance from foreign affiliates, in at least two ways: The California insurer's employees could travel overseas to examine the documents themselves, or the California insurer could disaffiliate and thus shed any reporting requirement. Either way, foreign insurers would bear no burden resulting from their affiliates' compliance with HVIRA.

In summary, the statutes at issue in *Adventure Communications, American Charities,* and *Quill Corp.* are distinguishable from HVIRA because they directly regulated

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5. The Gerling and Winterthur Plaintiffs point to letters sent by the California State Treasurer to Plaintiffs' foreign affiliates, urging the companies to help their California affiliates comply with HVIRA. However, these letters were requests, not demands, and carried with them no threat of direct sanctions. Foreign affiliates were and are free to ignore these entreaties. Accordingly, these letters cannot be characterized as a form of direct regulation imposed on foreign insurers.

Moreover, even if these letters were improper, they do not make the statute unconstitutional on its face. HVIRA places no demands directly on foreign insurers; if the Commissioner or other state officials erroneously do so, they do not alter the statute.

out-of-state businesses. By contrast, HVIRA directly regulates the behavior of only California insurers.

B. *Regulation of the Substance of Out-of-State Transactions*

A second line of cases addresses the extent to which a state may regulate, and thereby alter, the *substance* of a transaction executed outside the state and having few in-state consequences. These cases proceed from an analogy based on the "choice-of-law" principle, that is, whether a state has sufficient contacts with the parties and the transaction to apply its substantive law to affect the nature of the transaction. *See, e.g., Allstate Ins. Co. v. Hague,* 449 U.S. 302, 308 (1981).

Thus, in *Home Insurance Co. v. Dick,* 281 U.S. 397, 403-04 (1930), the Supreme Court considered whether a Texas insurance statute could apply in the context of litigation over an insurance policy that had been issued in Mexico, by a Mexican insurer, to a Mexican citizen, covering losses occurring in Mexican waters. The statute, had it applied, would have invalidated an essential substantive term in the insurance policy that was legal in Mexico. *Id.* at 404-05; *id.* at 407 ("As construed, it also directs the disregard in Texas of contractual rights and obligations wherever created and assumed; and it commands the enforcement of obligations in excess of those contracted for."). The Court held that the statute, as applied, violated due process because there were insufficient contacts between Texas and the insurance policy that the statute served to alter: "Texas was therefore without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize

property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law." *Id.* at 408.

Similarly, in *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 67-70 (1954), the Supreme Court applied the legislative jurisdiction doctrine to a Louisiana insurance statute that purported to void certain provisions in insurance contracts entered into outside Louisiana. Likewise, in *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149 (1934), the Court refused to enforce a Mississippi statute that altered the terms of an out-of-state contract for a fidelity bond. The Court held:

> The Mississippi statutes, so construed, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory; but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen.
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> . . . A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the

> relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment.

Id. at 149-50 (citations omitted).

More recently, in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 799 (1985), the Supreme Court examined whether a Kansas court could apply Kansas law to a class action involving plaintiffs from all 50 states who were seeking to recover royalty payments with respect to lands leased by Phillips Petroleum in 11 states. Highlighting the substantive differences between the laws of Kansas and the laws of the states where the lands were leased, the Court held that Kansas lacked sufficient contacts with the out-of-state transactions to apply Kansas law. *Id.* at 816-17, 821.

HVIRA's reporting provisions do not seek to regulate the substance of out-of-state transactions. The statute does not require insurers to pay any claims or otherwise alter the terms of Holocaust-era insurance policies.[6] To the contrary, HVIRA requires California insurers only *to disclose information about* their foreign transactions or those of their affiliates. A request for information is simply not equivalent

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6. Plaintiffs contend that HVIRA's definition of "proceeds," Cal. Ins. Code § 13802(c), rewrites the terms of the foreign insurance policies because the parties to the insurance contracts never contemplated or bargained for such a definition. However, this definition of "proceeds" is *for reporting purposes only* and does not alter the substantive terms of, or obligations arising under, any insurance policy.

to a direct regulation of out-of-state transactions. Thus, cases such as *Hague, Dick, Watson, Hartford,* and *Phillips* are inapposite because HVIRA does not change the terms or enforceability of the insurance policies issued by Plaintiffs or their foreign affiliates.

Plaintiffs counter by asserting that the express purpose of HVIRA is to force California-licensed insurers and their foreign affiliates to pay any outstanding Holocaust-era claims long after the statute of limitations for such claims has run. However, this assertion ignores the fact that the statute has several other purposes as well. As we said in our previous opinion, it "also is likely that California's legislature simply intended to protect its residents from insurance companies that have not paid valid insurance claims." *Gerling I,* 240 F.3d at 745. Further, the Commissioner has propounded other legitimate purposes for the statute, such as informing California residents about potentially valid claims and about the character of the family of companies with whom they might contract for insurance.

Plaintiffs point to two other California statutes that, they contend, *do* seek to regulate the substance of foreign transactions. California Code of Civil Procedure § 354.5 allows California residents to bring claims for the payment of Holocaust-era insurance policies and extends the statute of limitations on such claims until December 31, 2010. California Insurance Code § 790.15 requires the Commissioner to suspend the certificate of authority of any insurer who has failed to pay claims on valid Holocaust-era policies. It may well be that these statutes were enacted in excess of California's legislative jurisdiction. However, we reiterate

that these separately enacted provisions are not before us.[7] Because HVIRA does not change any obligation of any party to a foreign insurance contract, it is distinguishable from the precedents examined in this section.

C. *Taxation of In-State Entities Arising From Transactions Conducted Entirely Out-of-State*

In the third category of precedents on which Plaintiffs rely, the Supreme Court has applied a due process analysis to state statutes taxing out-of-state insurance transactions. Under these cases, a statute may exceed a state's legislative jurisdiction if it taxes a foreign insurer disproportionately to its activities in the taxing state, even if the taxing statute does not change the substantive terms of any foreign insurance policy.

In *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77, 79 (1938), the Supreme Court invalidated a California statute taxing California-licensed insurers' receipt of premiums on reinsurance held by other California insurers. The reinsurance contracts that the state sought to tax were executed in Connecticut, where the premiums were paid and the losses, if any, were payable. *Id.* The Court found that California did not have a sufficient connection to the insurance policies to tax them because "[n]o act in the course of their formation, performance or discharge, took place" in the state. *Id.* at 81. Accordingly, the Court held that the statute violated due process: "The tax cannot be sustained

7. In *Gerling I*, the district court held that Plaintiffs did not have standing to challenge these provisions, and Plaintiffs did not appeal this aspect of the court's decision. 240 F.3d at 742-43.

either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state." *Id.* at 82.

Similarly, in *American Oil Co. v. Neill,* 380 U.S. 451, 452 (1965), the Court employed a due process analysis to invalidate an Idaho tax on a state-licensed dealer in motor fuels that had sold a large amount of fuel through a series of out-of-state transactions. The Court held that the state could not constitutionally tax the extraterritorial sales because they were insufficiently related to the dealer's activities within Idaho. *Id.* at 457-58. The Court reaffirmed the principle that "there must be some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Id.* at 458 (citation and internal quotation marks omitted).

Plaintiffs argue that *Connecticut General* and *Neill* are indistinguishable from the case before us. They note that HVIRA requires California insurers to expend resources in order to disclose information about transactions that were entered into and performed (or not performed) entirely outside the state. Thus, they argue that HVIRA, like the statutory provisions analyzed in *Connecticut General* and *Neill,* imposes financial consequences on in-state insurance companies based on those companies' out-of-state activities.[8]

8. Notwithstanding the Commissioner's argument to the contrary, later decisions of the Supreme Court have not eviscerated *Connecticut General* and *Neill.* Cases such as *ASARCO Inc. v. Idaho State Tax Commission,* 458 U.S. 307 (1982), and *Allied-Signal, Inc. v. Director, Division of Taxation,* 504 U.S. 768 (1992), can be read (Cont'd)

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HVIRA is distinguishable from the statutes analyzed in *Connecticut General* and *Neill* because the only regulation that it imposes on Plaintiffs is a duty to disclose information, rather than to pay money to the regulating state. A state's taxing the extraterritorial transactions of in-state insurance companies (thus gaining financially from a multi-jurisdictional entity's revenues) and a state's asking for information about those same transactions are qualitatively different requirements. The former is a form of direct regulation of the out-of-state transaction, and collects money on behalf of the state itself, while the latter is simply a means for the state to assure the corporate good character and financial viability of companies doing business within the state. Plaintiffs' argument proves too much, because nearly every regulatory, record-keeping, and reporting statute requires a regulated entity doing business in more than one jurisdiction to expend resources to comply. Thus, we draw a bright line between obtaining information and obtaining tax revenues, just as we drew a bright line between obtaining information and substantively regulating the topics contained in the informational reports.[9]

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as requiring the taxing state to have minimum contacts with the transaction to be taxed. *ASARCO,* 458 U.S. at 315, 327-29 (citing *Connecticut General*); *Allied Signal,* 504 U.S. at 778 ("Although our modern due process jurisprudence rejects a rigid, formalistic definition of minimum connection, we have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax.").

9. We also question the force of authorities such as *Connecticut General* and *Neill* outside the context of taxation. We already have
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D. *Conclusion*

Were we to hold that a state may require companies operating within the state to *report* on only those out-of-state activities with which the state can claim minimum contacts, our logic would invalidate many existing reporting statutes.[10] State statutes and regulations routinely require multinational insurance companies, banks, and the like to disclose foreign activities and transactions engaged in by them and their parent and affiliate companies. Under Plaintiffs' strict conception of the legislative jurisdiction doctrine, states would be prohibited from requesting information about potentially fraudulent conduct committed by a local company's European parent simply because the "subject matter" of that conduct was a foreign transaction among foreign nationals. The

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acknowledged that cases defining the outer limits of a state's power to tax are not always readily transferable to other contexts. *See, e.g., Atonio v. Wards Cove Packing Co.*, 10 F.3d 1485, 1495 n.8 (9th Cir.1993) (finding inapplicable "the line of cases . . . in which the Supreme Court has struck down discriminatory state tax provisions for lack of a rational basis" because "state tax cases may genuinely be viewed as *sui generis;* it is an area where the Supreme Court has remained active long after ceasing to invalidate other economic legislation on equal protection grounds").

10. Examples of statutes that could be constitutionally problematic under Plaintiffs' proposed analysis include: California Insurance Code § 699.5 (foreign subsidies); *id.* § 717 (qualifications for certificate of authority); *id.* §§ 1215-1215.16 (Insurance Holding Company System Regulatory Act); California Financial Code §§ 5800-5811 (savings and loan holding companies); *id.* §§ 10000-10009 (foreign savings companies).

Supreme Court cases do not contemplate the use of the legislative jurisdiction doctrine to eviscerate state regulatory power so completely.

In conclusion, the legislative jurisdiction analysis is inapplicable to HVIRA, because it does nothing more than seek information from California-licensed insurers. Therefore, the Commissioner need not prove that minimum contacts exist between California, Plaintiffs' foreign affiliates, and the Holocaust-era policies issued by them. Instead, the state's power to enact and enforce HVIRA is bounded only by *other* constitutional protections. It is to an analysis of these other protections that we now turn.

SUBSTANTIVE AND PROCEDURAL DUE PROCESS

The district court held that HVIRA violates procedural due process by "mandating license suspension for non-performance of what may be impossible tasks without allowing for a meaningful hearing." *Gerling II,* 186 F. Supp. 2d at 1113. In the district court's view, the statute is unconstitutional because it does not allow a hearings officer to consider any excuse for noncompliance, even when an insurer can prove that it lacks control over the information requested or that disclosure of the information would violate foreign law. *Id.* at 1111. This aspect of the district court's decision is legally flawed because it conflates the analytically distinct concepts of procedural and substantive due process.

Regulated parties generally have a right to a meaningful hearing only with respect to those defenses actually allowed under a given statute. Thus, if a particular defense is deemed

irrelevant under the statute, a party has no *procedural* due process right to a hearing with respect to that defense. Instead, the party's only avenue of recourse is to declare that it has a right to present its chosen defense as a matter of *substantive* due process. *See, e.g., Burlington N.R.R. v. Dep't of Pub. Serv. Regulation,* 763 F.2d 1106, 1113 (9th Cir. 1985) ("If the statute is constitutional, the lack of a hearing does not make it unconstitutional. A state does not violate due process by making a legislative determination rather than a particularized inquiry if the subject of the legislation does not interfere with the exercise of fundamental rights."); *see also Bell v. Burson,* 402 U.S. 535, 541 (1971) ("The main thrust of Georgia's argument is that it need not provide a hearing on liability because fault and liability are irrelevant to the statutory scheme. We may assume that were this so, the prior administrative hearing presently provided by the State would be appropriate to the nature of the case." (citation and internal quotation marks omitted)).

Accordingly, the district court erred by not engaging in a two-step inquiry to determine, first, whether Plaintiffs were constitutionally entitled to raise foreign-affiliate and foreign-law defenses to HVIRA and, second, whether the statute provides Plaintiffs with the requisite level of process with respect to the defenses allowed under the statute. We will consider each aspect of this two-part analysis.

A. *Substantive Due Process and the Proposed Defenses*

Plaintiffs argue that, as a matter of substantive due process, they must be entitled to raise defenses premised on their lack of control over the required information or the

illegality under foreign law of their disclosure of the information.[11] We are not persuaded.

Because HVIRA neither employs a suspect classification nor infringes on a fundamental right, the applicable standard of review is the rational basis test. *See Richardson v. City of Honolulu,* 124 F.3d 1150, 1162 (9th Cir. 1997) ("We will strike down a statute on substantive due process grounds if it is arbitrary and irrational."); *Wedges/Ledges of Cal., Inc. v. City of Phoenix,* 24 F.3d 56, 66 (9th Cir. 1994) ("When reviewing the substance of legislation or governmental action that does not impinge on fundamental rights, . . . we do not require that the government's action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did."). Accordingly, the proper standard by which to measure HVIRA's license-revocation provisions is whether they bear "a rational relationship to a legitimate state interest." *Burlington N.,* 763 F.2d at 1109.

The Commissioner justifies the statute in several ways. First, the statute expressly states that its purpose is to provide California residents with information that facilitates their

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11. HVIRA *does* incorporate a "literal impossibility" defense. That is, if a company's Holocaust-era records no longer exist, the statute does not require their disclosure. Cal. Code Regs. tit. 10, § 2278.2(a); *Gerling II,* 186 F. Supp. 2d at 1105. The Commissioner also represents in his briefs that "[s]uspension could also be avoided if the information exists but is not in the possession, custody or control of the licensee or any of its related companies (e.g., if the information is in the possession of an unrelated company or is only located in a government archive)."

resolution of legitimate claims, if any, against private insurance companies through an international process or otherwise. Cal. Ins. Code § 13801.[12] Second, as we have acknowledged, California's legislature could have intended the statute to provide a means of protecting state residents from insurance companies that have not paid valid claims. *Gerling I,* 240 F.3d at 745. Third, the state has a legitimate interest in providing information to its citizens about the character of the family of insurance companies from which they are contemplating buying insurance.

Plaintiffs counter that the sole express *and* implicit purpose of the law is to force California-licensed insurers and their foreign affiliates to pay Holocaust-era claims. They ask us to reject the Commissioner's assertion of alternative purposes. Although subjectively the legislature's main purpose was to facilitate payment of Holocaust-era claims, we read the legislature's declared purposes to be somewhat broader than that. *See* Cal. Ins. Code § 13801(c), (e) (stating in part that insurers may be the sole source of information about Holocaust-era policies and that insurers have a responsibility to disclose that information to the state).

More importantly, however, the legislature's subjective or declared purpose is irrelevant in the context of rational basis review. A statute must be upheld under the rational basis

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12. Helping California residents recover on valid insurance claims is a legitimate governmental purpose. The record shows that many Holocaust survivors are poor; to the extent that information can facilitate their recovery of insurance (through the means that Plaintiffs themselves recognize as valid, or otherwise), it will ease the burden on the state's fisc.

analysis if it can be justified by *any* legitimate purpose, even one on which the government did not rely in enacting the statute, and even if the statute does a poor job of advancing the intended aims. *Dittman,* 191 F.3d at 1031 ("[W]e do not require that the government's action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did." (citation and internal quotation marks omitted)); *Richardson,* 124 F.3d at 1162 ("In a substantive due process challenge, we do not require that the City's legislative acts actually advance its stated purposes . . . ." (citation and internal quotation marks omitted)).

Faced with precedent suggesting that the California legislature's actual subjective or declared purpose in enacting the statute is irrelevant, Plaintiffs next argue that HVIRA's reporting requirements are not rationally related to any of the asserted purposes of the statute. They argue that the significance of the information requested under HVIRA cannot be analyzed meaningfully without considering whether Plaintiffs' affiliates were legally obligated to pay policyholders under foreign law. Similarly, they contend that, if the statute were directed at the integrity of California licensees, it would seek information not only on foreign affiliates' payment of Holocaust-related claims in Europe between 1920 and 1945, but also on all other aspects of the affiliates' claims-handling history. Further, they argue that there is no evidence of a relationship between Plaintiffs' current claims-handling practices in California and the claims-handling practices of their foreign affiliates in Europe dating back more than half a century ago. In other words, they argue that HVIRA is over-inclusive in some respects and under-inclusive in others.

But, under the rational basis test, California need not demonstrate that the statute will *actually* serve the articulated purposes. Instead, the statute is constitutional if the legislature rationally could have *believed* that HVIRA would promote a legitimate objective. *Dittman,* 191 F.3d at 1032; *Burlington N.,* 763 F.2d at 1110. Further, a statute need not be a comprehensive response to a given problem to be rationally related to a legitimate governmental interest. Instead, legislation may proceed " 'one step at a time' " and still satisfy the rational basis test. *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology,* 228 F.3d 1043, 1052-53 (9th Cir. 2000) (quoting *Williamson,* 348 U.S. at 489), *cert. denied,* 532 U.S. 972 (2001). The Holocaust is unique, and California's decision to proceed first with respect to these particular claims is both understandable and permissible. Finally, it is not only the claims-handling practices of 50 years ago that are at issue, but also the current and continuing failure of California-licensed insurers and their foreign affiliates to disclose information about any outstanding potentially valid claims.

Having thus established that, in general, HVIRA is constitutional under the rational basis test, we next must address whether the statute's failure to provide for foreign-affiliate and foreign-law defenses is *also* rationally related to legitimate governmental interests. We conclude that, even assuming that the California licensees do not have control of information in the hands of their foreign affiliates and that disclosure pursuant to HVIRA violates European data protection laws, those facts do not make the statute unconstitutional because it was rational for the legislature to require disclosure as a condition to holding an insurance license in

California. We agree with the Commissioner that the suggested defenses would hamper the state's ability to provide information to Holocaust victims and their families about potentially valid claims, to protect California citizens from insurance companies that have a history of refusing to pay valid claims or of refusing to inform potential beneficiaries about policy proceeds to which they may be entitled, and to inform California citizens about the character of the family of insurance companies from which they are contemplating buying insurance. California is entitled to condition the privilege of doing business in the state on the disclosure of information in which California has a legitimate interest.

Were a defense based on lack of control over requested information a requirement of substantive due process, an insurer could evade *any* kind of state disclosure statute or regulation simply by transferring all relevant documents to an affiliate over which it lacks direct control. Similarly, were a defense premised on foreign law required by due process, state regulatory efforts could be hindered by foreign statutes enacted for the purpose of shielding foreign corporations from routine reporting requirements.

Plaintiffs respond that, public policy notwithstanding, substantive due process requires that they be allowed to raise these defenses. They rely heavily on *Societe Internationale pour Participations Industrielles et Comerciales, S.A. v. Rogers,* 357 U.S. 197 (1958); *Falstaff Brewing Corp. v. Miller Brewing Co.,* 702 F.2d 770, 782-83 & n.8 (9th Cir. 1983); and *In re United States v. Sumitomo Marine & Fire Insurance Co.,* 617 F.2d 1365, 1369 (9th Cir. 1980).

However, those cases are easily distinguishable. *Societe Internationale* concerned only "whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order." 357 U.S. at 210. The Supreme Court made a point to limit its decision to the context of discovery sanctions:[13] "We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control." *Id.* at 205-06. In *Sumitomo,* this court *affirmed* a discovery sanction tantamount to dismissal even though the government-plaintiff was unable to comply with the district court's discovery orders due to "serious understaffing" rather than bad faith. 617 F.2d at 1369-70. Finally, *Falstaff* dealt with sanctions arising in the context of criminal contempt, where willful disobedience of a court order must be proved beyond a reasonable doubt. 702 F.2d at 782. We have found no decision holding that privacy protections under foreign law, or lack of control over

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13. Courts discussing *Societe Internationale* have interpreted the reach of its due process holding narrowly even in the context of discovery sanctions. *See, e.g., Richmark Corp. v. Timber Falling Consultants,* 959 F.2d 1468, 1474 (9th Cir. 1992) ("Cases since *Societe Internationale,* however, have emphasized that a foreign-law prohibition will not always excuse compliance with a discovery order."); *United States v. Vetco, Inc.,* 691 F.2d 1281, 1287 (9th Cir. 1981) ("*Societe Internationale* did not erect an absolute bar to summons enforcement and contempt sanctions whenever compliance is prohibited by foreign law."); *United States v. Bank of Nova Scotia (In re Grand Jury Proceedings),* 691 F.2d 1384, 1388 (11th Cir. 1982) ("[T]he Supreme Court did not erect an absolute bar to sanctions being imposed for noncompliance with summons or subpoenas whenever compliance is prohibited by foreign law.").

information, excuses compliance with disclosure obligations required as a condition for obtaining or retaining a business license.

By contrast, other persuasive precedents support the proposition that a statute may be constitutional yet at the same time make no allowance for an "impossibility" defense. *See, e.g., Danfield v. Johns-Manville Sales Corp. (In re Asbestos Litigation),* 829 F.2d 1233, 1235, 1244 (3d Cir. 1987) (upholding the constitutionality of state law prohibiting defendants from raising an impossibility defense to tort claims); *United States v. City of Hoboken,* 675 F. Supp. 189, 197-98 (D.N.J. 1987) (rejecting the defendant's substantive due process argument "that constitutional principles of fundamental fairness mandate an impossibility defense" to the Clean Water Act); *cf. Hawkins v. Agric. Mktg. Serv.,* 10 F.3d 1125, 1134 (5th Cir. 1993) (holding that a statute did not violate due process even though it mandated revocation of the plaintiff's license in response to behavior in which the plaintiff took no part, and despite the fact that the plaintiff had no opportunity to demonstrate his innocence).

Because a defense based on lack of control over records or on the conflicting demands of foreign law would thwart the legitimate regulatory purposes of HVIRA, we find no violation of substantive due process.

B. *Procedural Due Process Under HVIRA*

Plaintiffs argue that HVIRA is unconstitutional on its face because it makes no provision for a hearing prior to

revocation of an insurance company's license. The statute provides that "[t]he Commissioner *shall* suspend the certificate of authority to conduct insurance business in the state of any insurer that fails to comply with [HVIRA]." Cal. Ins. Code § 13806 (emphasis added). However, because the statute must be, and in fact is, interpreted to require such a hearing, HVIRA does not violate procedural due process on its face.

Plaintiffs' licenses to do business in California are protected property interests. *See Bell,* 402 U.S. at 539 ("Once licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."). The state may not revoke a protected property interest without first providing a meaningful hearing. *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976); *Bell,* 402 U.S. at 541-42.

Because HVIRA does not expressly provide for such a hearing, Plaintiffs assert that it is facially unconstitutional. What this argument fails to recognize is that, under California law, such a hearing must be implied into the statute. The state's administrative procedure act requires the provision of those procedures that are required by the federal or state constitutions. Cal. Gov't Code § 11410.10. Further, the California Supreme Court has established a presumption that hearing requirements should be inferred in a statute like HVIRA "unless the statute expressly provides to the contrary." *Fascination, Inc. v. Hoover,* 246 P.2d 656, 662 (Cal. 1952).

Thus, when read in the context of other state law, HVIRA requires the Commissioner to hold a hearing before revoking the license of an allegedly noncomplying insurance company. He concedes that this is so. As properly and as actually interpreted, therefore, the statute is not facially unconstitutional for failure expressly to provide for a hearing.

OTHER CONSTITUTIONAL CLAIMS

In addition to making due process arguments, Plaintiffs claim that HVIRA violates the foreign affairs power of the United States, the Commerce Clause, the Bill of Attainder Clause, the Equal Protection Clause, the Fourth Amendment, and the Contract Clause. None of these arguments provides a persuasive alternative justification for affirming the district court's decision.

A. *Foreign Affairs Power and Commerce Clause*

In response to Plaintiffs' challenges based on the foreign affairs power and the Commerce Clause, we already have held that HVIRA is *facially* constitutional. *Gerling I*, 240 F.3d at 751, 743. We are not persuaded that we erred.

Plaintiffs now argue that, *as applied*, HVIRA runs afoul of these constitutional provisions.[14] As discussed above, California has urged foreign insurers to help their state-

14. As Plaintiffs Assicurazioni Generali, American Insurance Association, and American Re-insurance Company candidly admit, "[i]nsurers ask the Court to *reconsider* its holdings on their foreign affairs power and Foreign Commerce Clause claims." (Emphasis added.)

licensed affiliates comply with HVIRA, but it has not sought to regulate these foreign insurers directly. That being so, the record contains insufficient evidence to demonstrate that the statute, as applied to Plaintiffs, is unconstitutional under the foreign affairs power or the Commerce Clause.

B. *Bill of Attainder Clause*

Next, Plaintiffs argue that HVIRA constitutes a bill of attainder because the statute seeks to punish a specific person or group of persons for past conduct without a judicial trial. *See* U.S. Const. art. I, § 10, cl. 1. We disagree.

"Three requirements must be met to establish a violation of the bill of attainder clause: '[S]pecification of the affected persons, punishment, and lack of a judicial trial.' " *United States v. Munsterman*, 177 F.3d 1139, 1141 (9th Cir. 1999) (quoting *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 847 (1984)). Assuming—without deciding—that HVIRA meets the first and third elements, it fails to meet the second.

We consider three factors when determining whether "a statute inflicts punishment that implicates the Bill of Attainder Clause." *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 728 (9th Cir. 1992). We ask "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a [n] . . . intent to punish.' " *Id.* (quoting *Selective Serv. Sys.*, 468 U.S. at 852).

First, the statute does not fall within the historical meaning of legislative punishment. The ultimate sanction available to the Commissioner, suspension of an insurer's license to do business, may be such a punishment. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 474-75 (1977) (noting that legislative punishment includes "barring designated individuals or groups from participation in specified employments or vocations"); *Selective Serv. Sys.*, 468 U.S. at 852 ("[T]he list of punishments forbidden by the Bill of Attainder Clause has expanded to include legislative bars to participation by individuals or groups in specific employments or professions."). Even if it is, however, suspension can occur only after a California insurer fails to comply with the statutory demand for information; that is, the statute imposes a sanction on the basis of an insurer's future conduct. Generally, a statute that leaves open the possibility of compliance, and thus avoidance of punishment, does not fall within the historical meaning of legislative punishment. *See id.* at 853 (upholding a statute denying educational funding to students who failed to register for the draft, in part because the statute allowed students to qualify for aid after properly registering).

Second, as discussed above, HVIRA furthers nonpunitive legislative purposes: providing data to Holocaust victims and their families about potentially valid claims, protecting California citizens from insurance companies that have a history of refusing claims or refusing to disclose information, and telling California citizens about the character of the family of insurance companies from which they are contemplating buying insurance.

Third, the legislative record does not evince an intent to punish foreign insurance companies or their California-licensed affiliates. As even Plaintiffs concede, the text of the statute and its legislative history demonstrate that the statute was subjectively intended as a means of facilitating payment of Holocaust-era policies.[15] Being asked to account for potentially valid insurance claims is not punishment, even if it proves embarrassing to some insurers. Nowhere in the statute's history does the California legislature express a desire to "punish" California insurers or their foreign affiliates. Because HVIRA is not a "punishment," it is not an unconstitutional bill of attainder.

C. *Contract Clause*

Plaintiffs assert that HVIRA violates the Contract Clause by attempting to modify the express terms of European insurance policies. *See* U.S. Const. art. I, § 10, cl. 1. By doing so, they argue, HVIRA would substantially impair the rights and responsibilities of parties to private contracts entered into decades ago and having no relation to California. As we have explained, this argument mischaracterizes the nature of the statute and the relevance of its definition of the term "proceeds." HVIRA, as distinct from other California statutes whose constitutionality is *not* at issue here, does not compel payment of any Holocaust-era claim and does not alter the substance of any insurance contract. Accordingly, HVIRA does not violate the Contract Clause.

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15. The other legitimate purposes that we have discussed above, to the extent that they are reflected in the legislative record, likewise involve no intent to punish insurers.

D. *Equal Protection Clause*

Plaintiffs argue that HVIRA violates equal protection. However, Plaintiffs do not assert that the statute treats them differently as a result of their membership in a protected class. Instead, they claim only that HVIRA imposes weightier reporting burdens on insurance companies that either directly or through related entities sold insurance policies in Europe from 1920 to 1945. In the circumstances, we evaluate the equal protection challenge under the rational basis test. *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 668 (1981).

In this context, Plaintiffs again urge that the Commissioner can articulate no rational basis sufficient to justify the statute. However, for the reasons discussed above, we disagree. Consequently, the insurers have not demonstrated that HVIRA violates equal protection.

E. *Fourth Amendment*

Finally, Plaintiffs argue that HVIRA violates the Fourth Amendment. Like the equal protection argument, however, this claim is simply a rearticulation of another argument: Because HVIRA purportedly exceeds California's legislative jurisdiction, its investigation into the affairs of European insurance companies is an unconstitutional search. According to Plaintiffs, an investigation exceeds the scope of a governmental agency's investigatory power if it is one that the demanding agency is not authorized to make. They cite in support of this proposition *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946).

We have no quarrel with the general proposition. But HVIRA does not empower the Commissioner to make disclosure requests that exceed his constitutional authority. Therefore, the statute does not violate the Fourth Amendment in the manner argued.

ATTORNEY FEES

Plaintiffs assert that the district court abused its discretion by denying their motion for attorney fees. Because the district court improperly concluded that HVIRA was unconstitutional, it also erred in concluding that Plaintiffs were "prevailing parties" for the purposes of 42 U.S.C. § 1988. They are not entitled to fees.

CONCLUSION

HVIRA is not unconstitutional in any of the particulars argued by Plaintiffs. The district court erred in concluding otherwise.

REVERSED and REMANDED with instructions to vacate the injunction and to grant the Commissioner's motion for summary judgment.

Appendix A

ORDER AND DENIAL OF REHEARING DATED SEPTEMBER 9, 2002

The opinion filed July 15, 2002, is amended as follows:

On slip opinion page 9856, line 3 from the bottom, insert ", denied the Commissioner's summary judgment motion," so the sentence reads as follows: "The court granted Plaintiffs' summary judgment motion, denied the Commissioner's summary judgment motion, and permanently enjoined the Commissioner from enforcing the statute."

On slip opinion page 9857, second full paragraph, replace the first sentence and citation with: "We review de novo the district court's grant or denial of summary judgment. *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1164 (9th Cir. 2000)."

On slip opinion page 9882, last two lines, replace with: "REVERSED and REMANDED with instructions to vacate the injunction and to grant the Commissioner's motion for summary judgment."

The panel has voted to deny the Plaintiffs' petitions for panel rehearing. With the above amendments, the panel has voted to deny the Defendant's petition for panel rehearing. Judges Graber and Paez have voted to deny the Plaintiffs' petitions for rehearing en banc, and Judge Goodwin has so recommended.

Appendix A

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on the petitions.

The Plaintiffs' petitions for panel rehearing and petitions for rehearing en banc are DENIED. With the above amendments, the Defendant's petition for panel rehearing is DENIED.

No subsequent petitions for rehearing or rehearing en banc may be filed.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED OCTOBER 1, 2001 AND FILED OCTOBER 2, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CIV. S-00-0506 WBS JFM

Consolidated Cases:
No. CIV. S-00-0613 WBS JFM
No. CIV. S-00-0779 WBS JFM
No. CIV. S-00-0875 WBS JFM

GERLING GLOBAL REINSURANCE CORP. OF AMERICA, et al.,

Plaintiffs,

v.

HARRY LOW, in his capacity as the INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,

Defendant.

MEMORANDUM AND ORDER

In October 1999, California enacted the Holocaust Victim Insurance Relief Act ("HVIRA"). *See* Cal. Ins. Code §§ 13800-13807 and accompanying regulations, Cal. Code Regs. Tit. 10 §§ 2278-2278.5. HVIRA relates to claims asserted by Holocaust victims or their heirs or beneficiaries for coverage under insurance policies issued in Europe

between 1920 and 1945. The stated purpose of HVIRA is to ensure that insurance companies doing business in the State of California disclose to the state "any involvement they or their related companies may have had with insurance policies of Holocaust victims." Cal. Ins. Code § 13801(e). HVIRA further declares that insurers in California have a responsibility to "ensure the rapid resolution of these questions [regarding unpaid Holocaust-era insurance policies], eliminating further victimization of these policyholders and their families." *Id.*

After briefing and a hearing regarding various constitutional challenges to the statute, this court found, in June of 2000, that plaintiffs had shown a probability of success on the merits of two of their claims: (1) that HVIRA interferes with the federal government's control over foreign affairs; and (2) that HVIRA violates the Commerce Clause, and therefore granted a preliminary injunction enjoining enforcement of the statute. The Ninth Circuit reversed the holdings upon which that injunction was based, but left the injunction in place, specifically referencing the "possibility" that HVIRA violates the Due Process Clause. *Gerling Global Reins. Corp. of Am. v. Low*, 240 F.3d 739, 754 (9th Cir. 2001), *petition for cert. filed* (U.S. June 26, 2001) (No. 00-1926).

The matter is now before this court on the parties' cross motions for summary judgment. All plaintiffs jointly move for summary judgment on the grounds that HVIRA violates the Due Process Clause because: (1) it is an extraterritorial regulation enacted in excess of California's legislative jurisdiction; and (2) it mandates the performance of impossible tasks and provides for automatic license

revocation upon non-performance. Defendant moves for summary judgment, and for the preliminary injunction to be dissolved, on the grounds that: (1) the Ninth Circuit's decision precludes any claim that HVIRA violates either the Foreign Affairs Power or the Commerce Clause; (2) HVIRA does not violate the Due Process Clause; and (3) HVIRA is not unconstitutional for any other reason raised in any plaintiff's complaint.

I. *Facts*

A. *The Statututory Framework*

After the National Socialist (NAZI) party came to power in Germany, it enacted a series of statutes authorizing governmental confiscation of Jewish property and other assets. These laws included insurance proceeds among the types of property that the government was authorized to seize from Jews. Under the NAZI statutes, German insurers were required to pay the proceeds of insurance policies of Jewish residents to "blocked accounts" controlled by the NAZI government. A 1943 statute also ordered confiscation of the estates of deceased Jews. Furthermore, although many Holocaust victims had insurance policies, many lost the papers during their imprisonment. In many cases, the persons most knowledgeable about the policy were killed, leaving heirs without a paper trail. As a result, many Holocaust victims and their descendants and heirs have never collected on their insurance policies.

HVIRA requires insurance companies doing business in California to file reports disclosing policies issued in Europe during the period 1920-1945. *See* Cal. Ins. Code §§ 13800-

13807. Other enabling statutes extend the statute of limitations for filing such claims (Cal. Civ. Proc. Code § 354.5), and provide procedures for the suspension of licenses of insurance companies who have not paid valid claims (Cal. Ins. Code § 790.15).[1]

B. *The Challenged Statute: California Insurance Code §§ 13800-13807 ("HVIRA")*

HVIRA obligates insurers doing business in California to file reports identifying insurance policies (life, property, liability, health, annuities, dowry, educational, or casualty) sold to persons in Europe between 1920 and 1945 directly or through a "related company." Cal. Ins. Code § 13804(a). A "related company" is defined as "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer." Cal. Ins. Code § 13802(b).

Specifically, the statute requires the insurer or related company to file with the registry: (1) the number of those insurance policies; (2) the holder, beneficiary, and current status of those policies; and (3) the city of origin, domicile, or address for each policy holder. Cal. Ins. Code § 13804(a). Filing false information under this section is punishable by civil penalties of up to $5,000.00 per policy.

Further, with regard to each policy, the insurer must certify one of the following: (1) that the proceeds of the policies have been paid to the designated beneficiaries or

1. Defendant's motion to dismiss plaintiffs' constitutional challenges to Cal. Civ. Proc. Code § 354.5(c) and Cal. Ins. Code § 790.15(c) for lack of standing was granted in June of 2000.

their heirs where that person or persons, after diligent search, could be located and identified; (2) that the proceeds where the beneficiaries or heirs could not, after diligent search, be located or identified, have been distributed to Holocaust survivors or to qualified charitable nonprofit organizations for the purpose of assisting Holocaust survivors; (3) that a court of law has certified in a legal proceeding resolving the rights of unpaid policyholders, their heirs, and beneficiaries, a plan for the distribution of the proceeds; or (4) that the proceeds have not been distributed and the amount of those proceeds. Cal. Ins. Code § 13804(b).[2]

The statute also directs that, if the reports are not filed by the 210th day after the HVIRA becomes effective, the Commissioner "*shall* suspend the certificate of authority to conduct insurance business in the state. . . ." Cal. Ins. Code § 13806. (emphasis added).

C. *The Parties*

Defendant is Harry Low in his capacity as the Commissioner of Insurance of the State of California. Plaintiffs are insurance companies licensed to do business in California. Four sets of plaintiffs originally filed separate complaints against then-Insurance-Commissioner Chuck Quackenbush. Those cases were consolidated as the present action and the plaintiffs now move jointly.

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2. The term "proceeds" is defined in the statute as "the face value or other payout of insurance policies and annuities plus reasonable interest to date of payment without dimunition for war-time or immediate postwar currency devaluation." Cal. Ins. Code § 13802(c).

Appendix B

1. *Gerling Global Reinsurance Corporation of America ("the Gerling plaintiffs")*

The Gerling plaintiffs are five insurance companies licensed to do business in California. They are "related to" or "affiliated" with two German companies (Gerling-Konzern Allgemenine Versicherungs-AG ("GKA") and Gerling-Konzern Lebensversicherungs-AG ("GKL")) that issued policies in Europe during the proscribed time period.

GKA and GKL do not conduct any business in the State of California either directly or through the Gerling plaintiffs. None of the Gerling plaintiffs is in possession, custody or control of records pertaining to any insurance policies in force in Europe at any time between 1920 and 1945. Further, the Gerling plaintiffs contend that they have no means to compel such information from their German affiliates. GKA and GKL believe that if they produce the information demanded by the HVIRA, they will face criminal and civil penalties under German law.[3]

2. *American Insurance Association and American Re-Insurance Co. (the "American plaintiffs")*

The American plaintiffs are American Insurance Association ("AIA") and American Reinsurance Company ("AmRe"). AIA is a national trade association of insurers, some of whom do business in California. AIA principally represents American insurance companies that did not issue

3. The parties have submitted competing expert declarations reaching differing conclusions as to whether German privacy law actually does preclude the HVIRA-mandated disclosures.

insurance policies in Europe during the relevant period and do not own or control any companies that did.[4] Several members of AIA are, however, "related to" European companies that issued policies during the relevant time period. AIA's affected members contend that they lack the corporate authority to compel their related European companies to produce the information required by the HVIRA. Further, plaintiffs believe that the law of the related European company's country forbids the disclosure of the kind of information required by HVIRA.

AmRe is a large insurance company licensed to do business in California. Neither AmRe, nor any subsidiary or affiliate over which it has control, issued insurance policies that were in effect in Europe from 1920 to 1945. AmRe is subject to the HVIRA's reporting requirements because it is "related," through its parent corporation, Munich Re, to two European insurers that issued insurance policies in Europe from 1920 to 1945. AmRe contends that neither AmRe nor Munich Re has the corporate authority to compel these European companies to produce the information required by the HVIRA. Further, according to AmRe, Munich Re believes it would have to violate German law in order to comply with HVIRA.

3. *Winterthur International American Insurance Co., et al. ("the Winterthur plaintiffs")*

The Winterthur plaintiffs are nine insurance companies licensed to do business in California. None of the companies

4. American Insurance does represent Assicurazioni Generali, a European Company discussed separately herein.

ever issued insurance policies in Europe during the applicable time period, though each is "related" to such a company. Each plaintiff claims, however, that it is not in possession, custody, or control of any records pertaining to insurance policies sold by "related companies." Further, the Winterthur plaintiffs contend that they lack the corporate authority to compel the production of the information required by the HVIRA. They also believe that to do so would violate European law.

4. *Assicurazioni Generali, S.p.A. ("Generali")*

Generali is an Italian corporation licensed to do business in California. It issued insurance policies in Europe during the applicable time period. The policies in question were issued in Europe to European insureds. According to Generali, these policies typically incorporated terms and conditions regulated by the laws of the country of issuance. For example, local laws "typically" required that reserves earmarked for these policies were to be maintained in the country of issuance and invested locally. (Carnicelli Decl. ¶ 3.). Apparently, some of the policies also included forum selection clauses requiring that disputes be heard in the country of issuance.

Though Generali cannot make the argument that it lacks the corporate authority to obtain the information necessary to comply with HVIRA, it has joined the joint motion arguing that making those disclosures would violate German law and subject the company to criminal and civil penalties.

Appendix B

D. *Defendant's Enforcement and Interpretation of the HVIRA Statutory and Regulatory Scheme*

1. *Prior to the Preliminary Injunction*

Prior to the issuance of the preliminary injunction, then-Commissioner Chuck Quackenbush actively threatened enforcement against all plaintiffs. He subpoenaed many insurance companies, including plaintiffs and those represented by plaintiffs, to appear at a hearing on December 1, 1999. At that hearing, Quackenbush informed the insurance companies, "[t]his issue will be resolved in California. I promised that for the last two years. And on April 6th, you're going to see just how serious California is if you have not complied with this law." (Agel Decl., Ex. 18, Transcript of December 1, 1999 Investigatory Hearing, 14:16-20). He told Generali specifically, "I want you to take back to your officers in Italy and everywhere else, that you might want to consider seriously leaving the State, because it's obvious to me right now that you have no intention of complying with the law." (Agel Decl., Ex. 18, 49:12-16). At the end of questioning Generali, Quackenbush stated generally, "[i]t is your choice now whether you're going to work with this Department of Insurance to bring your company in full compliance, whether you're going to leave the state voluntarily, or whether I'm going to kick you out. That's your three choices." (Agel Decl., Ex. 18, 51:19-23).

The preliminary injunction has prevented any such action as of yet. Meanwhile, there has been a change of leadership at the Department of Insurance, and plaintiffs have taken discovery regarding the manner in which the Department interprets and would implement HVIRA.

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2. *Since the Preliminary Injunction*

Leslie Tick, a senior counsel at the California Department of Insurance who is responsible for administering HVIRA, gave deposition testimony in this case as the Department's spokesperson on July 5, 2001. She testified that the only defense to non-compliance with HVIRA's reporting requirements is that the required documents do not exist. Failure to comply for any other reason, including lack of the corporate authority to compel production of the information or a belief that doing so would violate applicable European law, will trigger a license suspension action. (Agel Decl., Ex. 17, Tick Depo. at 227:9-238:17, 252:13-266:16).

Under questioning as to how HVIRA's mandatory suspension provision would be carried out by the Department, Ms. Tick further testified that a license suspension proceeding would involve a hearing before an administrative law judge to determine whether the insurer had complied with the statute. The judge would not, however, be able to exercise any discretion in his determination depending on whether the insurer was participating in good faith in ICHEIC, or whether the insurer could show that it did not control the information sought by HVIRA, or whether it could show that it or its affiliates were barred from producing the information by European privacy laws. *Id.* at 175:5—176:13.

II. *The Standard*

The court must grant summary judgment to a moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,

if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party adverse to a motion for summary judgment may not simply deny generally the pleadings of the movant; the adverse party must designate "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Simply put, "a summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). The non-moving party must show more than a mere "metaphysical doubt" as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

III. *Plaintiffs' Joint Motion for Summary Judgment*

Plaintiffs jointly move for summary judgment on the ground that HVIRA is an unconstitutional violation of the Due Process Clause of the U.S. Constitution.

A. *Law of the Case Doctrine*

The parties dispute both the meaning and effect of the Ninth Circuit's decision in *Gerling v. Low*, 240 F.3d 739 (9th Cir. 2001). As a threshold matter, it must be determined what issues are now properly before this court.

Defendant contends that the Ninth Circuit's *Gerling v. Low* opinion "effectively disposes of" all of plaintiffs' claims. Defendant argues: (1) that the Ninth Circuit's ruling finally disposes of plaintiffs' Commerce Clause and Foreign Affairs Power arguments; and (2) that the following language

from the opinion precludes any argument that the statute regulates extraterritorially because it is controlling under the "law of the case" doctrine: "HVIRA is a California insurance regulation of California insurance companies . . . [and] does not regulate foreign insurance policies, or control the substantive conduct of a foreign insurer, or otherwise affect the 'business of insurance' in any other country." *Id.* at 746.

Under the "law of the case" doctrine a decision of the court in a prior appeal must be followed in all subsequent proceedings in the same case. *Eichman v. Fotomat Corporation*, 880 F.2d 149, 157, (citing *Waggoner v. Dallaire*, 767 F.2d 589, 593 (9th Cir. 1985)), *cert. denied*, 475 U.S. 1064 (1986). This rule applies unless the first decision is clearly erroneous and would result in manifest injustice, an intervening change in the law has occurred, or the evidence on remand is substantially different. *Id.* It applies even where the first panel's holding was "cryptic and somewhat ambiguous." *Hanna Boys Ctr. v. Miller*, 853 F.2d 682, 687 (9th Cir. 1988); *see also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (the relevant inquiry on a law of the case question is whether a court previously decided an issue, not whether, or how well it explained the decision); *and Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir. 1995) (even issues treated summarily, without detailed explanation or analysis, become the law of the case).

While affirming this court's grant of plaintiffs' motion for a preliminary injunction, the Ninth Circuit ruled as follows:

> We hold that the district court erred when it decided that HVIRA violates the dormant Commerce Clause

> and the foreign affairs power. However, because the district court has not addressed Plaintiffs' claim that HVIRA violates the Due Process Clause, we leave the preliminary injunction in place and remand for further proceedings.

Gerling v. Low, 240 F.3d at 754.

As for the question of which legal issues remain open, the Court of Appeals in this case was quite explicit. It unambiguously intended to close the questions of HVIRA's constitutionality under the Commerce Clause or Foreign Affairs Power, but, just as clearly, it intended to leave open the question of whether the statute violates the Due Process Clause.

Defendant cites *Eichman*, 880 F.2d at 157, for the proposition that the law of the case doctrine encompasses both "a court's explicit decisions" and those "decided by necessary implication" and therefrom argues that the Ninth Circuit's prior ruling disposes of all of plaintiffs' claims, including the Due Process claims. Given its affirmation of the preliminary injunction and the specific language of its remand, the Ninth Circuit's opinion in this case cannot reasonably be read to "necessarily imply" that plaintiffs' due process claims are foreclosed.

For their part, plaintiffs contend that the Ninth Circuit's legal rulings should be given no weight at all on summary judgment because plaintiffs' pending Supreme Court certiorari petition renders the Commerce Clause and Foreign Affairs Power arguments unripe for decision.

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Plaintiffs argue that "[n]o purpose would be served by entering judgment on these claims, only to have the Supreme Court grant certiorari in October and reverse the Ninth Circuit on the merits." This court, however, is bound by existing rulings of the Ninth Circuit unless and until they are withdrawn or overturned; justice is not served by the type of speculative delay plaintiffs advocate.

Defendant's argument that certain factual findings are also the law of the case requires a slightly different analysis. Defendant's argument focuses on the Ninth Circuit's finding that HVIRA does not regulate foreign insurance policies, control the conduct of foreign insurers, or otherwise affect the "business of insurance" in foreign countries. *Gerling v. Low*, 240 F.3d at 746. This was a factual finding made in a "foreign commerce" context during an interlocutory appeal of a preliminary injunction. Findings on interlocutory appeals of preliminary injunctions do not generally constitute "law of the case". *City of Angoon v. Hodel*, 803 F.2d 1016, 1024 n.4 (9th Cir. 1986) (citations omitted).

The basis for distinguishing between factual findings made on direct appeal and factual findings made on interlocutory appeal of a preliminary injunction is that "the standard of review for factual determinations on direct appeal is higher than the standard applied during an interlocutory appeal of a preliminary injunction." *Royal Insurance Co. v. Quinn-L Capital Corp.*, 3 F.3d 877, 881 (5th Cir. 1993). Where, as here, a factual finding (i.e., that a statute regulates foreign conduct) did not survive the lower standard of review, it is arguably unlikely that the same or similar finding would

have survived or will survive the higher standard of review applied by the same court on direct appeal. This reasoning weighs in favor of applying the law of the case doctrine to all of the Court of Appeals' findings.

There are, however, likely to be contextual distinctions when a proposed factual finding is analyzed under or applied to disparate constitutional claims. Consequently, this court does not read the Ninth Circuit's opinion in this case to preclude plaintiffs from arguing that HVIRA regulates extraterritorially for the purposes of making their due process arguments. No aspect of plaintiffs' due process argument is now foreclosed by the "law of the case" doctrine.

B. *Due Process*

The Ninth Circuit left the preliminary injunction in place and specifically remanded to this court for consideration of the constitutionality of HVIRA under the Due Process Clause. All plaintiffs now challenge the statute on two due process grounds: (1) that it is an extraterritorial regulation enacted in excess of the state's legislative jurisdiction; and (2) that it mandates the performance of impossible tasks and provides for automatic license revocation upon non-performance.

1. *Whether HVIRA Violates Due Process Because it Was Enacted in Excess of California's Legislative Jurisdiction*

Plaintiffs argue that HVIRA violates the Due Process Clause because it was enacted in excess of California's

legislative jurisdiction. Defendant counters that, as a mere "licensing and reporting statute," HVIRA is a proper exercise of California's legislative jurisdiction.[5]

"Legislative jurisdiction" is a concept that courts have applied to describe the due process limits on the legislative power of a state. It is a concept employed to "determine the extraterritorial reach of a statute." *Adventure Communications Inc. v. Kentucky Registry of Election Finance*, 191 F.3d 429, 435 (4th Cir. 1999) (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting)). Like other jurisdictional doctrines, legislative jurisdiction is a threshold question. Applying guidelines similar to those used to determine personal jurisdiction, it requires that a state must have a significant contact or significant aggregation of contacts, creating state interests, such that application of its law is neither "arbitrary nor fundamentally unfair." *Adventure Communications*, 191 F.3d at 436-37 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)).

While noting that "it is possible that HVIRA violates the Due Process Clause," the Ninth Circuit made specific reference to *Gerling Global Reins. v. Nelson*, 123 F. Supp 2d 1298 (N.D. Fla. 2000), a recent Florida district court case that invalidated a Holocaust-era insurance statute on legislative jurisdiction grounds. The distinctions between

5. Plaintiffs also argue that "[s]ince the HVIRA does not regulate extraterritorially, plaintiff's legislative jurisdiction claims fail as a matter of law." For reasons discussed above, however, the court rejects defendant's contention that plaintiffs' legislative jurisdiction arguments are precluded by the law of the case doctrine.

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Florida's statute and California's HVIRA are illustrative of the purpose and effect of the legislative jurisdiction doctrine.

Florida's "Holocaust Victims Insurance Act," § 626.943, Fla. Stat. (1999), like California's HVIRA, requires insurers doing business in Florida to provide extensive information to the Florida Department of Insurance regarding policies issued to Holocaust victims by the insurers themselves or by any "parent, subsidiary, or affiliated company." § 626.9543(3)(d) & (7), Fla. Stat. (1999). The Florida statute also requires, however, that insurers actually pay claims on those policies, if such claims are established under a "reasonable, not unduly restrictive, standard of proof." § 626.9543(5)(b), Fla. Stat. (1999). Moreover, through its implementing regulations, it requires insurers doing business in Florida to pay not only their own claims but also to pay claims against any parent, subsidiary or corporate affiliate. *See* Rule 4-137.010(6), Fla. Admin. Code.

The Florida statute plainly attempted to exercise jurisdiction over the specific enforcement of European insurance contracts. In fact, the Florida Insurance Commissioner did not even try to justify the statute as a "means of determining whether plaintiffs themselves or their officers are fit to engage in the business of insurance in Florida," but instead acknowledged to the *Nelson* court that the statute's goal was to "bring about payment of amounts due." *Nelson*, 123 F. Supp 2d 1298, 1303 n. 9. Not surprisingly, the *Nelson* court held that "the efforts of the State of Florida to reach transactions entered in Germany between German parties having no connection with Florida are beyond the state's jurisdiction." *Id.* at 1304.

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Plaintiffs in this case argue that "similar legislative findings" preceded enactment of the California and Florida statutes. Those similarities, however, do not overcome the differences in the actual language and effect of the two statutes. Florida's statute is a far more direct attempt to "regulate extraterritorially," as contemplated by the legislative jurisdiction doctrine, than is HVIRA. Most notably, HVIRA lacks any mandate requiring insurers to actually pay claims. Plaintiffs have not established that HVIRA violates due process because it was enacted in excess of the state's legislative jurisdiction. Plaintiffs' motion for summary judgment on that ground must therefore be denied.

2. *Whether HVIRA Violates Due Process Because it Mandates the Performance of Impossible Tasks and Provides for Automatic License Revocation upon Non-Performance*

a. *Whether a license to do business as an insurer is a protected property interest for purposes of a Fourteenth Amendment analysis.*

The "threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution." *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972); *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994); *Kraft v. Jacka*, 872 F.2d 862, 866 (9th Cir. 1989). Courts have long wrestled with the question of exactly what "interests" the Fourteenth Amendment protects. Trying to define the constitutional concepts of "property interest" and "due process," early U.S. Supreme Court decisions looked back as far as the signing of the Magna Carta, "when the

great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown." *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877). More recently, we have recognized that our definition of a Fourteenth-Amendment-protected property interest is rooted in the idea that our property interests provide our "sources of security." *See Goldberg v. Kelly*, 397 U.S. 254, 263 n.8 (1970) (quoting Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1255 (1965)).

For decades now, courts have recognized protected property interests in many forms which fall outside the norm of common-law property. *See e.g. Mathews v. Eldridge*, 424 U.S. 319 (1976) (individual's interest in continued receipt of social security benefits is a statutorily-created property interest for purposes of a due process analysis); *and Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) (the rights of a party under a patent are a protected property interest for purposes of a due process analysis). Indeed, the Supreme Court has made it abundantly clear that "the property interests protected by due process extend well beyond actual ownership of real estate, chattels, or money." *Roth*, 408 U.S. at 571-72 (citing *Connell v. Higginbotham*, 403 U.S. 207, 208 (1971)).

Courts have also long recognized that licenses which enable one to pursue a profession or earn a livelihood are protected property interests for purposes of a Fourteenth Amendment analysis. "Once licenses are issued. . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state

action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Bell v. Burson*, 402 U.S. 535 (1971) (addressing suspension of drivers' licenses). The Ninth Circuit has specifically recognized that an existing license, in contrast to an applied-for license, constitutes a legitimate entitlement of which one cannot be deprived without due process. *See Greenwood v. Federal Aviation Administration*, 28 F.3d 971, 975 (9th Cir. 1994) (addressing suspension of pilot's license).

The Commissioner nonetheless advances the argument that doing business as an insurer in California is a "mere privilege" which, he argues, can be summarily withdrawn for "any legitimate reason" the State chooses, divines or fashions. Categorizing plaintiffs' licenses as "privileges" bestowed by the state does not immunize their suspension from a due process challenge. The Supreme Court has specifically "rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege.' " *Graham v. Richardson*, 403 U.S. 365, 374 (1971). An existing license to do business as an insurer in California is a property interest deserving of Fourteenth Amendment protection. Any action to suspend such a license must therefore be taken in conformity with the requirements of procedural due process.

b. *Ripeness of plaintiff's procedural due process challenge*

"Ripeness is peculiarly a question of timing." *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580 (1985). "Its basic rationale is to prevent the courts, through premature

adjudication, from entangling themselves in abstract disagreements." *Id.* In considering whether a case is ripe for review, a court must evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *Winter v. California Med. Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1990).

"The critical question concerning fitness for review is whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all." 15 Moore's Fed. Practice, § 101.76[1][a] (3d ed. 1999); *see also Union Carbide*, 473 U.S. at 580-81 (noting that a central component of the fitness for review factor is whether the motion involves uncertain or contingent future events that may never occur.) Though a procedural due process challenge here might theoretically be susceptible to the argument that it will not ripen until plaintiffs have actually been deprived of their protected property interest (i.e. until the Commissioner has made a final determination that plaintiffs' licenses should be suspended), the record in this case is now developed to the point that no legitimately unknown contingencies exist.

As for the second factor under *Winter*, all parties in this case will suffer hardship if determination of the constitutionality of HVIRA is further delayed. Plaintiffs, in particular, know with absolute certainty that, if HVIRA takes effect, suspension of their licenses to do business as insurance companies in California will follow forthwith. Waiting for this harm to be suffered, not only by the companies themselves, but by all the citizens of California who are their customers and employees, serves no one.

The court therefore concludes that the case is ripe for, and justice is best served by, a present determination of whether HVIRA survives a procedural due process challenge.

c. *Procedural due process's meaningful hearing requirement*

The court therefore turns to the question of whether HVIRA's procedures provide due process. "A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case." *Burson*, 402 U.S. at 540. The procedural safeguards sufficient to protect one's interest in welfare benefits, for example, may not suffice when one faces a felony charge. *Compare Goldberg v. Kelly*, 397 U.S. 254 (1970), *with Gideon v. Wainwright*, 372 U.S. 335 (1963). There are, however, certain longstanding bare minimum components to the right to procedural due process.

The opportunity to be heard "at a meaningful time and in a meaningful manner" is the fundamental requirement of procedural due process. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). For over one hundred years, our courts have held that due process of law requires "specific charges, due notice of such charges, an opportunity to make specific answers to them, an opportunity to cross-examine the witnesses in support of them, an opportunity to adduce testimony in contradiction of them, and an opportunity for argument upon the testimony and upon the law and facts." *United States ex rel. Wedderburn v. Bliss*, 12 App. D.C. 485, 493 (1898). Thus, in order to satisfy due process' "meaningful

hearing" requirement, the inquiry that is made must involve at least some assessment of fault or liability. *See Burson*, 402 U.S. at 539.

On its face, HVIRA makes no provision for any hearing whatsoever. Defendant argues that the statute's facial lack of a hearing provision does not render it unconstitutional because the right to a hearing must be "implied into" the statute itself in the absence of language to the contrary. *See Fascination Inc. v. Hoover*, 39 Cal.2d 260 (1952).[6] The hearing that will be provided under HVIRA, to the extent that HVIRA contemplates a hearing at all, however, is not a meaningful hearing for the purposes of surviving a due process challenge. Defendant's position, supported by the plain language of the statute, is that an insurer's failure to produce documents, for any reason other than the fact that no documents exist, will trigger an immediate license suspension action. According to defendant, that action will take the form of a hearing before an administrative law judge. Leslie Tick's testimony and the statute itself make it clear that the administrative law judge is not permitted to exercise

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6. Defendant, having thus apparently conceded that plaintiffs would be entitled to a hearing, (indeed, having argued that a hearing is so obviously necessary as to be implied), later cites *Codd v. Velger*, 429 U.S. 624, 628 (1977), for the proposition that "a hearing need not be provided when there are no factual issues in dispute." In other words, a hearing would be required in theory, but would not be required in application, because, here, there would be no facts to resolve. A statute that sustains such contrary reasoning in its defense, because it facially obviates any practical need for the impliedly-necessary and constitutionally-required hearing, must be a violation of due process.

any discretion as to whether non-compliance might be excused or justified, or mitigated in any way that could affect the outcome of the hearing.

Thus, as both this court and the defendant interpret the statute, the same sole fact that triggers the suspension hearing will dictate its outcome. That cannot possibly amount to a meaningful hearing. Such a "hearing" is particularly meaningless where, as here, the same individual who decides to trigger the hearing makes the final determination of whether to suspend the license.[7] Under HVIRA, failure to produce the demanded records for any reason at all, even impossibility, effectively results in automatic license suspension. This is the deprivation of a protected property interest without due process of law.

Defendant contends that there are disputed issues as to whether plaintiffs, as they have asserted, actually lack the corporate authority to compel production of the demanded documents from their affiliates. Other than raising evidentiary objections to plaintiffs' declarations and making legal arguments about the meaning of the word "control," defendant has not presented any substantial evidence to create a triable issue of fact on the question of corporate control. Defendant also disputes, and asks this court to determine as a matter of law, whether foreign criminal and civil laws

7. Section 790.15 specifies that an action to suspend a certificate of authority under this section shall be conducted in accordance with the Administrative Procedure Act. That Act directs that the "agency" itself, in this case, the Commissioner, render the final decision. Cal. Govt. Code § 11517.

prohibit production of the information required by HVIRA.[8] On a procedural due process analysis, however, the question of whether plaintiffs could ultimately prove that it is impossible for them to comply with HVIRA does not control.[9] The fact that the statute *denies them the opportunity to be heard on that point*, or, for that matter, on any point, is what controls.

d. *Whether the state's "licensure power" somehow obviates plaintiffs' entitlement to a meaningful hearing under procedural due process*

Defendant argues that "California can rationally condition the privilege of doing business in the State" on

8. Though the court declines to reach a conclusion of law as to whether German and/or Swiss laws prohibit plaintiffs' European affiliates from complying with HVIRA, the court notes that, other than making evidentiary objections, defendant has not presented evidence to refute the submitted position of the Swiss government as to the impact of Article 273 of the Swiss Penal Code. Moreover, if it were to reach the issue, this court would owe "substantial deference" to a foreign nation's interpretation of its own laws. *See In Re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992).

9. Plaintiff has submitted evidence which tends to show, at the least, that their affiliates believe compliance is unlawful and are refusing to provide the demanded documents. Recognition of impossibility as an excuse for non-performance is a long-standing tenet of our justice system. There are numerous cases which stand for the proposition that a sanction imposed for failing to produce information due to inability violates our notions of fundamental fairness and due process. *See e.g., Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 212 (1958); *and In re United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1369 (9th Cir. 1980).

strict compliance with HVIRA's disclosure requirements. Defendant persists in the position that the first, last, and only constitutional question in this case is the rational basis test. There are, however, other limitations on a state's power. The state cannot, for example, impose conditions on doing business in California which require relinquishment of constitutional rights. *See generally* Laurence H. Tribe, *American Constitutional Law* § 11.5 at 781 (2d ed. 1988) ("Independently unconstitutional conditions — those that make enjoyment of a benefit contingent on sacrifice of an independent constitutional right — are invalid."). *See also Barron v. Burnside*, 121 U.S. 186, 200 (1887) ("In all the cases in which this court has considered the subject of the granting by a state to a foreign corporation of its consent to do business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution."); *Terral v. Burke Constr. Co.*, 257 U.S. 529, 532-533 (1922) ("[T]he sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."); *and Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (simply denominating governmental interest as "business regulation" does not immunize it from constitutional challenge).

At oral argument and in its papers, defendant specifically referred to California's Insurance Holding Company System Regulatory Act, ("IHCSRA"), arguing that it establishes that California has an existing, presumably constitutionally permissible, public policy of requiring insurance companies to report information pertaining to their foreign affiliates. Several ways in which this regulatory

statute is distinguishable from HVIRA bear mention. First, it seeks significantly narrower information, related only to the affiliates' financial viability. Second, it specifically provides that the disclosed information shall be treated as confidential and shall not be made public by the Commissioner. Third, and most notably, it provides a forum within which insurers can present factual defenses to a failure to disclose "allegation" against them, and specifically dictates that an insurer will be given "notice and an opportunity to be heard" before the Commissioner acts to suspend, revoke, or refuse to renew a license for non-compliance with the disclosure requirements. *See* California Insurance Code § 1215 *et seq.* In short, IHCSRA is in many ways exactly what HVIRA is not. Its existence in no way establishes that HVIRA is constitutional, and it certainly does not support defendant's implied argument that the state's "licensure" power somehow trumps the requirements of procedural due process.

e. *Conclusion*

By providing that no state shall "deprive any person of life, liberty, or property without due process of law," the Fourteenth Amendment of our Constitution binds the fundamental protections of life, liberty, and property together into one concept. We need look no further than the factual background of this case to understand why these three protections are so joined.

Ever since the Fourteenth Amendment was enacted in 1866, courts have struggled to define precisely what it means to protect our property interests with "due process."

One tenet of this area of jurisprudence is clear, however: a state may not "make any thing due process of law" by merely declaring it to be so. *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877). The power of a state is not unchecked, and it is not absolute. Neither does it become so, as the Commissioner has argued here, under the cloak of some "licensure" power. It does not even become so if the power is wielded out of the purest intention to somehow right one of humanity's wrongs, or to facilitate some amount of redress for the victimized.

By mandating license suspension for non-performance of what may be impossible tasks without allowing for a meaningful hearing, HVIRA deprives plaintiffs of a protected property interest without affording them due process of law. Plaintiffs' joint motion for summary judgment that the HVIRA is unconstitutional under the Due Process Clause must therefore be granted.

IV. *Other Grounds for Summary Judgment*

Plaintiffs have also argued that the statute is unconstitutional for various other reasons, including that it is unconstitutionally vague. Because the court finds that the statute violates the Due Process Clause, and because, following the guidance of the Ninth Circuit's remand, the parties have focused their development of the factual record on due process issues, the court does not reach the other constitutional challenges raised by plaintiffs.

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Also, defendant moves for summary judgment on the ground that HVIRA is not constitutional for any other reason raised in any plaintiffs' complaint.[10] Because the court finds that the statute is unconstitutional on due process grounds, the court need not render advisory opinions on defendant's arguments that the statute passes other constitutional tests. Defendant's motion for summary judgment will therefore be denied on the ground that the statute violates due process.

IT IS THEREFORE ORDERED that plaintiffs' motions for summary judgment upon the ground that HVIRA violates due process be, and the same hereby are, GRANTED. Defendant is hereby permanently enjoined from suspending the licenses of the plaintiffs to do business in California based on their failure to comply with the Holocaust Victim Insurance Relief Act and its accompanying regulations.

IT IS FURTHER ORDERED that defendant's motion for summary judgment upon the ground that HVIRA is not unconstitutional be, and the same hereby is, DENIED.

DATED: October 1, 2001

s/ William B. Shubb
William B. Shubb
UNITED STATES DISTRICT JUDGE

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10. Defendant's original moving papers addressed all of plaintiffs' constitutional challenges except the due process argument raised by the Generali plaintiffs concerning the Commissioner's allegedly unconstitutional "campaign" against Generali.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED FEBRUARY 7, 2001

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00-16163

D.C. No.
CV-00-00506-WBS

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. — U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA INSURANCE COMPANY; and CONSTITUTION INSURANCE CORP.,

Plaintiffs-Appellees,

v.

HARRY W. LOW,* in his capacity as the COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA,

Defendant-Appellant.

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* Harry W. Low is substituted for his predecessor as Commissioner of Insurance for the State of California. Fed. R. App. P. 43(c)(2).

Appendix C

No. 00-16164

D.C. No.
CV-00-00875-WBS

ASSICURAZIONI GENERALI,

Plaintiff-Appellee,

v.

HARRY W. LOW, individually, and in his capacity as the INSURANCE COMMISSIONER for the STATE OF CALIFORNIA,

Defendant-Appellant.

No. 00-16165

D.C. No.
CV-00-00779-WBS

WINTERTHUR INTERNATIONAL AMERICA INSURANCE COMPANY, WINTERTHUR INTERNATIONAL AMERICA UNDERWRITERS INSURANCE COMPANY; GENERAL CASUALTY COMPANY OF WISCONSIN; REGENT INSURANCE COMPANY; REPUBLIC INSURANCE COMPANY; SOUTHERN INSURANCE COMPANY, UNIGARD INDEMNITY COMPANY; UNIGARD INSURANCE COMPANY; and BLUE RIDGE INSURANCE COMPANY,

Plaintiffs-Appellees,

v.

Appendix C

HARRY W. LOW, in his capacity as INSURANCE COMMISSIONER for the STATE OF CALIFORNIA,

Defendant-Appellant.

No. 00-16182

D.C. No.
CV-00-00613-WBS

AMERICAN INSURANCE ASSOCIATION and AMERICAN RE-INSURANCE COMPANY,

Plaintiffs-Appellees,

v.

HARRY W. LOW, in his capacity as INSURANCE COMMISSIONER for the STATE OF CALIFORNIA,

Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted
January 9, 2001—San Francisco, California

Filed February 7, 2001

Before: Alfred T. Goodwin, Susan P. Graber, and
Richard A. Paez, Circuit Judges.

Opinion By Judge Graber

Appendix C

OPINION

GRABER, Circuit Judge:

Plaintiffs are three insurance companies and one trade organization of insurance companies who do business in California. They sued the California Commissioner of Insurance (Commissioner) seeking declaratory and injunctive relief to bar enforcement of the Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§ 13800-13807 (1999). The district court issued a preliminary injunction after ruling that Plaintiffs had established a likelihood of irreparable harm and a probability of success on the merits of the questions whether HVIRA violates the Commerce Clause and whether it violates the federal government's "foreign affairs" power. The Commissioner brings this appeal. We leave the preliminary injunction in place, but for reasons different than those expressed by the district court.

FACTUAL AND PROCEDURAL HISTORY

HVIRA requires insurers that do business in California and that sold insurance policies, in effect between 1920 and 1945 (Holocaust-era policies), to persons in Europe to file certain information about those policies with the Commissioner.[1] Cal. Ins. Code § 13804(a). The reporting

1. The information that the insurance companies must provide is: (1) the number of insurance policies; (2) the holder, beneficiary, and current status of each policy; and (3) the city of origin, domicile, or address for each policyholder listed in each policy. Cal. Ins. Code § 13804(a)(1)-(3). In addition, the insurer must certify that: (1) the (Cont'd)

requirement also applies to insurance companies that do business in California and are "related" to a company that sold Holocaust-era policies, even if the relationship arose after the policies were issued. *Id.* A "related company" is any "parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer." *Id.* § 13802(b). HVIRA requires the Commissioner to store the information in a public "Holocaust Era Insurance Registry." *Id.* § 13803. The Commissioner must "suspend the certificate of authority to conduct insurance business in the state of any insurer that fails to comply" with HVIRA's reporting requirements. *Id.* § 13806.

Plaintiffs filed four separate actions against the Commissioner, in which they sought to enjoin enforcement of HVIRA. The actions were brought by: (1) Gerling Global Reinsurance Corp. of America and its affiliates (collectively, Gerling), who are, according to their complaint, "arguably 'affiliated' [with] . . . or 'related [to]' " two German insurers that issued Holocaust-era policies; (2) American Insurance Association (AIA), a nonprofit trade association of insurers

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(Cont'd)

proceeds of the policies were paid; or (2) the beneficiaries or heirs could not be located after diligent search, and the proceeds were distributed to Holocaust survivors or charities; or (3) a court of law has certified a plan for distributing the proceeds; or (4) the proceeds have not been distributed. *Id.* § 13804(b)(1)-(3). The implementing regulations state that, if "the insurer states that it has no actual policies to report because the records are no longer in the possession of the insurer or its related company(ies), it shall provide a complete explanation of that statement." Cal. Code Regs. tit. 10, § 2278.2(a) (2000). Any insurer who knowingly files false information is subject to a penalty of up to $5,000. Cal. Ins. Code § 13805.

whose member-insurers are required to report under HVIRA, and American Re-insurance Company, a wholly owned subsidiary of a German corporation "that has investment interests in European insurance companies that do issue insurance policies"; (3) Winterthur International America Insurance Company, its affiliates, and numerous other insurance and underwriting companies (collectively, Winterthur), who are "arguably 'related companies' . . . with more than forty insurance companies currently located in Europe"; and (4) Assicurazioni Generali (Generali), an Italian insurance company that issued Holocaust-era policies and currently does business in California. The district court determined that the four cases were "related" within the meaning of Eastern District of California Local Rule 123(a) and assigned the cases to the same judge, but did not consolidate them.

Plaintiffs sought declaratory and injunctive relief, claiming that HVIRA violates the Commerce Clause, the Due Process Clause, the Equal Protection Clause, and the foreign affairs power. Gerling also asked the court to review two statutes that were enacted at the same time as HVIRA: (1) California Code of Civil Procedure § 354.5 (1999), which allows California residents to bring claims for the payment of Holocaust-era insurance policies and extends the statute of limitations on such claims until December 31, 2010; and (2) California Insurance Code § 790.15 (1999), which requires the Commissioner to suspend the certificate of authority of any insurer who has failed to pay on valid Holocaust-era policies. The Commissioner filed a motion to dismiss in which he argued that Gerling did not have standing to challenge California Code of Civil Procedure § 354.5 or

California Insurance Code § 790.15. The district court granted the motion, ruling that Gerling had not established an imminent threat of prosecution under those statutes. Gerling does not challenge that holding.

Plaintiffs all filed motions for a preliminary injunction. The district court granted their motions, holding that "plaintiffs have established a probability of success under the foreign affairs doctrine and the Commerce Clause." The court did not rule on Plaintiffs' other grounds for relief. The district court also held that Plaintiffs had established the likelihood of irreparable injury.

The Commissioner timely appealed the district court's orders in all four cases. We have jurisdiction under 28 U.S.C. § 1292(a)(1). Because these cases all involve the same legal issues, we consider them together.

STANDARD OF REVIEW

We review for abuse of discretion the grant of a preliminary injunction. *FDIC v. Garner,* 125 F.3d 1272, 1276 (9th Cir. 1997). A district court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Roe v. Anderson,* 134 F.3d 1400, 1402 (9th Cir. 1998).

DISCUSSION

A. *The Standard for Issuing a Preliminary Injunction*

"To obtain a preliminary injunction, a party must establish either: (1) probable success on the merits and irreparable

injury, or (2) sufficiently serious questions going to the merits to make the case a fair ground for litigation with the balance of hardships tipping decidedly in its favor." *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998). The two alternatives represent two points on a sliding scale. *Roe*, 134 F.3d at 1402. The district court held that Plaintiffs' actions fell within the first category. The Commissioner does not dispute the district court's finding of irreparable injury; rather, he questions whether the district court abused its discretion in ruling that Plaintiffs established a probability of success on the merits.

The district court's reasoning implies that Plaintiffs demonstrated a probability of success on their claim that HVIRA is unconstitutional on its face. The court did not make individualized findings of irreparable injury, nor did it discuss either constitutional claim in the context of a particular Plaintiff. As presented in this appeal, Plaintiffs' challenges to HVIRA involve issues of law only.

B. *The Commerce Clause Claim*

As noted, the district court held that Plaintiffs established a probability of success that HVIRA violates the Commerce Clause. We disagree and hold that the district court based its conclusion on an erroneous view of the law.

1. *The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1014 (1945) (McCarran Act)*

In *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944), the Supreme Court held that the "business of insurance" fell within Congress' power to

regulate interstate commerce. That holding conflicted with the previous understanding of the relationship between the business of insurance and the Commerce Clause; before 1944, the Court had implied that the states could regulate the insurance industry without federal interference. *See Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 414-16 (1946) (discussing the history of insurance regulation and the Commerce Clause).

The McCarran Act was Congress' response. *Id.* Title 15, § 1011 of the McCarran Act states:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Section 1012(a) provides that the "business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business." The phrase "business of insurance" refers to "the relationship between the insurance company and the policyholder" and includes "the fixing of rates[,] . . . [t]he selling and advertising of policies, and the licensing of companies and their agents." *SEC v. National Sec., Inc.,* 393 U.S. 453, 460 (1969) (citations omitted).

2. *The McCarran Act Applies to HVIRA*

Plaintiffs argue, and the district court held, that the McCarran Act does not apply to HVIRA because it is an impermissible "extraterritorial" regulation, as discussed by the Supreme Court in *FTC v. Travelers Health Ass'n*, 362 U.S. 293 (1960), and by this court in *Ace Check Cashing, Inc. v. Aetna Casualty & Surety Co. (In re Insurance Antitrust Litigation)*, 938 F.2d 919 (9th Cir. 1991), *aff'd in part, rev'd in part sub nom. Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993). Neither *Travelers* nor *In re Insurance* applies to the present dispute, however.

Travelers and *In re Insurance* involved the interpretation of § 1012(b) of the McCarran Act, which instructs courts not to construe any other federal statute as preempting a state insurance regulation unless there is a clear statement from Congress to do so. Section 1012(b) reads in part: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance [.]" Section 1012(b) also provides that the Sherman Act, the Clayton Act, and the Federal Trade Commission (FTC) Act *do* apply to the "business of insurance," but only "to the extent that such business is not regulated by State law."

The Supreme Court in *Travelers* and this court in *In re Insurance* held that Congress did not intend to shield an insurance company from federal regulation if one state expressly regulated an insurance company's conduct, but the conduct that the federal government sought to regulate

occurred in a different state. In *Travelers,* a Nebraska statute prohibited Nebraska insurance corporations from engaging in unfair trade practices "in any other state." 362 U.S. at 296. A Nebraska insurance corporation argued that the Nebraska statute precluded the FTC, under § 1012(b) of the McCarran Act, from regulating conduct of the insurance corporation that occurred outside Nebraska. The Supreme Court disagreed, concluding that Congress did not intend for the "law of a single State [to take] from the residents of every other State the protection of the" FTC Act. *Id.* at 298.

The Court observed that Congress had delegated its power to regulate insurance because it believed that insurance regulation was a local matter. *Id.* at 302. The Court reasoned that the insurance company's argument would subvert the McCarran Act; if one state had a fair-trade statute that purported to regulate nationwide, an insurance company located there would be free from the reach of the FTC Act in every other state. The Court's interpretation of 15 U.S.C. § 1012(b) avoided this absurd result.

Similarly, in *In re Insurance,* this court applied *Travelers* to reject the notion that Congress intended for the antitrust law of a single state to preclude application of the Sherman Act to insurers' conduct that occurred in other states. *In re Insurance,* 938 F.2d at 928. We noted that "[s]tate insurance schemes do not, and could not, purport to regulate the bulk of international insurance transactions." *Id.* (citation and internal quotation marks omitted).

In neither case did the court evaluate the constitutionality under the Commerce Clause of the state act that attempted to regulate "extraterritorially." Instead, both cases involved

statutory interpretation. The courts merely held that, irrespective of the constitutional limits of a state's power to regulate extraterritorially, Congress did not intend for the regulatory scheme of one state to protect the citizens of all other states and thereby eliminate the need for federal regulation.

There is a second important distinction between the two cited cases and the present dispute: the difference between HVIRA and the state laws considered in *Travelers* and *In re Insurance.* In those cases, the state laws sought to regulate directly the conduct of an insurer in another jurisdiction. By contrast, HVIRA seeks only to obtain information about conduct in another jurisdiction, without affecting directly any of that conduct. For those two reasons, neither *Travelers* nor *In re Insurance* answers the question that we face.

The district court's holding that the McCarran Act does not apply to HVIRA also rested on its belief that HVIRA must be viewed as a part of California's overall plan to force foreign insurance companies to settle insurance claims with California's residents. The district court cited HVIRA's legislative findings and declarations and held that HVIRA encourages the resolution of claims concerning Holocaust-era policies "through an international process" and thus attempts to "regulate the decision making authority of European insurance companies to pay or not to pay claims on European policies." That reasoning mischaracterizes HVIRA as a matter of law.

HVIRA, by its terms, does not regulate "the decision making authority of European insurance companies to pay or not to pay claims on European policies" in any way.

Appendix C

HVIRA requires California companies only to *provide information* about Holocaust-era insurance policies that they (or any of their affiliates) issued.

A second and separate statute, California Code of Civil Procedure § 354.5, allows California residents to bring claims for payment of Holocaust-era insurance policies. A third statute, California Insurance Code § 790.15, authorizes the Commissioner to suspend the licenses of insurance companies who have not paid valid Holocaust-era claims. The district court dismissed Gerling's action challenging the validity of those two provisions because Gerling lacked standing. In short, the question of the validity of those two statutes must remain for another day.

It is true that, by enacting HVIRA, California's legislature intended to help California residents recover on unpaid policies that were entered into in foreign countries by giving them access to information. It also is likely that California's legislature simply intended to protect its residents from insurance companies that have not paid valid insurance claims.[2] In any event, however, the legislature's stated purpose in enacting a statute is not dispositive of a dormant Commerce Clause challenge. The Commerce Clause seeks to prevent extraterritorial economic "effects," not purposes. *See Healy v. Beer Institute,* 491 U.S. 324, 336 (1989) ("The

2. The state requests information from foreign insurers in other contexts, too. For example, California Insurance Code § 699.5 (1994) requires insurers that are owned, operated, or controlled by other governments to provide information so that the Commissioner can determine whether "the insurer is subject to any form of subsidy that would enable it to compete unfairly with domestic insurers."

critical inquiry is whether the *practical effect* of the regulation is to control conduct beyond the boundaries of the State." Extraterritorial regulation "is invalid regardless" of the intent of the enacting legislature.) (emphasis added); *Birth Hope Adoption Agency, Inc. v. Arizona Health Care Cost Containment Sys.*, 218 F.3d 1040, 1044 (9th Cir. 2000) ("The first step in evaluating state regulatory measures under the dormant Commerce Clause is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.") (citations and internal quota-tion marks omitted).

HVIRA's reporting requirements might force a "related" company of a California business to search for information, but that is the extent of HVIRA's "extraterritorial" reach. HVIRA, on its face, does not regulate foreign insurance policies, or control the substantive conduct of a foreign insurer, or otherwise affect "the business of insurance" in any other country.

In conclusion, Congress has expressly delegated to the states the power to regulate insurance, free from the constraints of the dormant Commerce Clause. The Supreme Court has noted that the "licensing of companies" is part of the "business of insurance" and is covered by the McCarran Act.[3] *National Sec.*, 393 U.S. at 460. HVIRA is a California insurance regulation of California insurance companies that

3. Plaintiffs implicitly recognize that HVIRA regulates the "business of insurance." Seeking information from insurers about their claims-paying record, to be used in the licensing process, is a form of regulating the business of insurance.

affects foreign commerce only indirectly. Consequently, the McCarran Act applies and the dormant Commerce Clause does not. *See Benjamin*, 328 U.S. at 430-31 (noting that Congress, through the McCarran Act, "clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for").

3. *HVIRA Does Not Impede the Federal Government's Ability to Speak With "One Voice" on a Matter Affecting Foreign Commerce*

HVIRA touches on foreign commerce because of the indirect effect described above. The question remains whether that fact provides an independent reason to hold that Plaintiffs have established a probability that HVIRA is unconstitutional. The answer is "no."

The Supreme Court confronted a similar issue in *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994). There, the Court considered whether California's worldwide-reporting tax system violated the dormant Commerce Clause. The Supreme Court, after noting that the California tax was constitutional under typical dormant Commerce Clause analysis, evaluated whether the tax's effect on *foreign* commerce impaired the federal government's ability to speak with "one voice." *Id.* at 328. The Court held that it did not. *Id.*

The Court noted that Congress had considered, and eventually rejected, legislation that would have precluded state statutes like the one in dispute in *Barclays*. *Id.* at 324-28. The Court reasoned that Congress was willing "to tolerate" the states' worldwide-reporting tax statutes. *Id.* at 327. Significantly, the Court then observed that "the foreign policy of the United States . . . [is] much more the province of the Executive Branch and Congress than of this Court"; therefore, the foreign companies' argument that the California statute "is unconstitutional because it is likely to provoke retaliatory action by foreign governments is directed to the wrong forum." *Id.* at 327-28 (citation and internal quotation marks omitted).

Similarly, in *Wardair Canada, Inc. v. Florida Department of Revenue,* 477 U.S. 1 (1986), the Court evaluated whether a Florida tax on airline fuel, which increased the tax liability of foreign airlines, prevented the federal government from speaking with "one voice." The Court concluded that the Florida tax did not violate the Commerce Clause. *Id.* at 12-13. The federal government had entered into more than 70 bilateral aviation agreements, none of which purported to *preclude* the type of tax enacted by Florida. The Court reasoned: "By negative implication . . . , the United States has at least acquiesced" in the type of statute enacted by Florida. *Id.* at 12. Moreover, "[i]t would turn dormant Commerce Clause analysis upside down to apply it where the Federal Government has acted, and to apply it in such a way as to *reverse* the policy that the Federal Government has elected to follow. . . . [T]he Federal Government is entitled in its wisdom to act to permit the States varying degrees of regulatory authority." *Id.* (emphasis in original).

Appendix C

Barclays and *Wardair Canada* teach that, before we can hold that an otherwise constitutional state statute[4] that affects foreign commerce is unconstitutional because it prevents the federal government from speaking with "one voice," we must examine whether the federal government has *chosen* to permit the states to act. After conducting that examination, we hold that Congress has spoken affirmatively in the area of Holocaust-era insurance policies and has acquiesced in state laws like HVIRA.[5]

In 1998, Congress passed the U.S. Holocaust Assets Commission Act of 1998 (Holocaust Act), Pub. L. 105-186, 112 Stat. 611, as amended Pub. L. 106-155, § 2, 113 Stat. 1740 (1999) (codified at 22 U.S.C. § 1621 note), in order "to establish a commission to examine issues pertaining to the disposition of Holocaust-era assets in the United States . . . and to make recommendations to the President on further action, and for other purposes." Holocaust Act Intro. The Holocaust Act instructs the Commission to "conduct a thorough study and develop a historical record of" certain assets, "if such assets came into the possession or control of the Federal Government." *Id.* § 3(a)(1). The

4. In both *Barclays* and *Wardair Canada*, the state statute was "otherwise constitutional" because it did not discriminate against interstate commerce, while in the present case HVIRA is "otherwise constitutional" because of the McCarran Act.

5. A much stronger case for congressional acquiescence exists here than in *Wardair Canada* or *Barclays*. In those cases, the Court inferred congressional acquiescence by negative implication. In the present case, however, we need not draw a negative inference from what Congress did *not* say, but can draw a positive inference from what Congress *did* say in the Holocaust Act.

Commissioner and Amicus the State of California argue that § 3(a)(4), which concerns Holocaust-era insurance policies, is relevant to this litigation:

> In carrying out its duties under this Act, the Commission shall take note of the work of the National Association of Insurance Commissioners with regard to Holocaust-era insurance issues and shall encourage the National Association of Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, doing business in the United States at any time after January 30, 1933, that issued any individual life, health, or property — casualty insurance policy to any individual on any list of Holocaust victims. . . .

Id. § 3(a)(4)(A). The report by the National Association of Insurance Commissioners (NAIC) "should include the following, to the degree the information is available": (1) the number of policies issued by insurance companies to victims of the Holocaust; (2) the value of each policy at the time of issue; (3) the total number of policies, and the dollar amounts, that have been paid out; and (4) the total present-day value of assets in the United States of each company. *Id.* § 3(a)(4)(B). Section 3(a)(3), entitled "Coordination of Activities," states that the Commission "shall, to the maximum extent practicable, coordinate its activities with, and not duplicate similar activities already being undertaken by, private individuals, private entities, or *government entities,* whether *domestic* or foreign." (Emphasis added.) Section 3(b) adds that the

Commission "shall review comprehensively any *research by . . . non-Federal government entities,* whether *domestic* or foreign." (Emphasis added.)

The Holocaust Act does not refer in so many words to state legislation as a cause of domestic governments' undertaking this "research," § 3(b), nor does it explain what "work" of NAIC the Commission is to take "note" of, § 3(a)(4). There are several reasons, however, why we read the Holocaust Act to embrace state legislation like HVIRA.

NAIC is an organization of insurance regulators from the 50 states. The Holocaust Act asks for detailed information on the Holocaust-related claims practices of "*all insurance companies, both domestic and foreign,* doing business in the United States at any time after January 30, 1933." *Id.* § 3(a)(4)(A) (emphasis added). This information is to include data on individual Holocaust-era policies. *Id.* If Congress was expecting a detailed report on the claims practices and policies of "foreign" insurance companies from an organization consisting only of state insurance regulators, Congress must have expected that the regulators would be acting pursuant to state law. Congress must also have been aware that, in order to fulfill the Holocaust Act's broad objectives, state insurance commissioners might have to require the foreign affiliates of domestic insurance companies to search a foreign office for information on Holocaust-era policies.

Even if Congress' reference to the "work" of NAIC is not, by itself, encouragement of state statutes like HVIRA, Congress was aware that domestic governmental entities were

conducting research into the activities of Holocaust-era insurers. As noted, § 3(b) of the Holocaust Act requires the Commission to "review comprehensively any research by . . . *non-Federal government entities,* whether domestic or foreign" (emphasis added), and § 3(a)(3) requires the Commission to "coordinate its activities" with those of domestic governmental entities.

The legislative history of the Holocaust Act supports our conclusion that Congress was aware of the states' efforts to obtain information on Holocaust-era insurance policies. In 1998, there was a flurry of activity in Congress relating to Holocaust-era assets. On February 12, 1998, the House Committee on Banking and Financial Services held a hearing on "The Restitution of Art Objects Seized by the Nazis from Holocaust Victims and Insurance Claims of Certain Holocaust Victims and Their Heirs": Hearing Before the House Comm. on Banking & Fin. Servs., 105th Cong. 131 (Feb. 12, 1998).

State Insurance Commissioners Quackenbush (of California) and Senn (of Washington) testified at that hearing. Commissioner Senn noted that she chaired the NAIC "Holocaust Insurance Issues Working Group," which was investigating Holocaust-era insurance issues with the help of "state insurance departments." *Id.* 1998 WL 65380. She explained that NAIC had requested voluntary cooperation from the insurance companies but, "[i]f our requests for cooperation are not satisfied, then the states may begin to exercise [regulatory] powers." *Id.* "Congress and the States can work together," Commissioner Senn concluded. *Id.* 105th Cong. at 134. Commissioner Quackenbush added

that he had held hearings in California relating to this issue, and he was "prepared to revoke [the] certificate of authority, which allows a company to sell insurance in California, for [any insurance company] and any of its American subsidiaries, if it fails to" provide information on Holocaust-era policies. *Id.* at 142. The Chair of the House committee, Representative Leach, who sponsored the Holocaust Act two months later, noted:

> [L]et me say that because this is an issue of international significance, there are aspects of the American system that are not widely understood abroad, and one relates to the Federal nature of America, particularly in the insurance arena, *the decision of the United States Congress, in effect, either to devolve or not to assume responsibility for basic insurance regulation, which gives the States a significant role. And that means that as two symbolic State insurance commissioners, there's a great deal of authority that resides in your offices.*

Id. at 157 (emphasis added).[6] On the basis of the text, context, and history of the Holocaust Act, we conclude that Congress was aware of the states' involvement in this area and, at least implicitly, encouraged laws like HVIRA.

Notwithstanding the Holocaust Act, Plaintiffs argue, and the district court held, that HVIRA conflicts with a federal

6. Representative Leach submitted a draft of the bill, H.R. 3662, to the House on April 1, 1998. *See* 1998 Cong. Q. 3662, 105th Cong., 2d Sess.

policy relating to "Holocaust victims compensation efforts" as evidenced by three actions undertaken by the executive branch. They are: (1) the Foundation Agreement between Germany and the United States (Foundation Agreement); (2) the International Commission on Holocaust Era Insurance Claims (ICHEIC); and (3) the Swiss-US Joint Statement. The following is a brief summary of each:

a. *The Foundation Agreement*

In December 1999, the German government and German companies agreed to fund a DM 10 Billion Foundation to settle Nazi-era claims, in exchange for the voluntary dismissal of lawsuits that had been filed against German companies. The German government has agreed to fund the Foundation when all such claims pending in United States courts have been finally dismissed.

On July 17, 2000, the United States and the German government signed the Foundation Agreement. The Agreement recognizes "as legitimate the interest German companies have in all-embracing and enduring legal peace." It also states that "it would be in the interests of both parties for the Foundation to be the exclusive remedy and forum for addressing all claims[ ] that have been or may be asserted against German companies" arising from Nazi-era activities. Foundation Agreement at 2, 4.

The United States, in Article 2 of the Foundation Agreement, agreed to the following in pertinent part:

> (1) The United States shall, in all cases in which the United States is notified that a claim described

> in article 1(1) has been asserted in a court in the United States, inform its courts through a Statement of Interest . . . that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims asserted against German companies . . . and that dismissal of such cases would be in its foreign policy interest.
>
> (2) The United States, recognizing the importance of the objectives of this agreement, including all-embracing and enduring legal peace, shall, in a timely manner, use its best efforts, in a manner it considers appropriate, to achieve these objectives with state and local governments.

Annex B of the Foundation Agreement explains that the United States will "recommend dismissal" of lawsuits "on any valid legal ground." Paragraph seven of Annex B recognizes, however, that the "United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal, but will reinforce the point that U.S. policy interests favor dismissal on any valid legal ground."

b. *The ICHEIC*

The ICHEIC was established in 1998 by NAIC in cooperation with several European insurance companies, European regulators, representatives of nongovernmental organizations, and the State of Israel. The United States has the status of an "observer." The ICHEIC is a voluntary,

private organization that was created with the goal of implementing a "just process . . . that will expeditiously address the issue of unpaid [Holocaust-era] insurance policies." The ICHEIC creates an "International Commission" that is charged with initiating an "investigatory process to determine the current status of those insurance policies . . . for which claims are filed." To assess the remaining unpaid insurance policies of Holocaust victims, "a reasonable review will be made of the participating companies' files."

c. *The Swiss-US Joint Statement*

At the inaugural meeting of the Swiss-US Joint Economic Commission in January 2000, the two countries issued a Joint Statement stating that they "[h]ave decided to endow their partnership with a long-lasting perspective, through continued and institutionalized dialogue." Section 2.4(b) of an "Action Plan" annexed to the Joint Statement notes that many Swiss insurance companies have settled insurance lawsuits, and "U.S. authorities will call on the U.S. State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers."

We next consider the effect of those three actions on the validity of HVIRA. Significantly, Plaintiffs do not argue that HVIRA is preempted by any of the three. Instead, Plaintiffs claim that the three actions simply are evidence of a foreign policy with which HVIRA conflicts. We are not persuaded.

Appendix C

First, we question whether there is in fact any policy conflict between HVIRA, the enactment of which Congress encouraged in the federal Holocaust Act, and the executive branch initiatives. HVIRA seeks information for two main purposes: enabling victims of the Holocaust to know whether they have insurance claims, and protecting Californians from insurers that have not paid valid claims. The second purpose conflicts with no federal policy of which we are aware. The first is consistent with the overall goal of the three initiatives: to resolve Holocaust-era claims. In other words, the Holocaust Act, HVIRA, and the executive branch initiatives share the same policy objective, although they seek to achieve that policy objective by varying techniques.

Second, we note that two of the executive branch initiatives are country-specific. The German Foundation Agreement pertains to German insurers. The Swiss-US Joint Statement pertains to Swiss insurers. That being so, neither of those initiatives governs with respect to Generali (an Italian insurer) or Winterthur (which apparently has affiliates throughout Europe).

Third, as Plaintiffs concede, none of the three initiatives has preemptive effect. The German Foundation Agreement mentions the United States' interest in the *voluntary* dismissal of lawsuits against German corporations and, by its terms, "does not suggest that [the United States'] policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal" of any lawsuit. Foundation Agreement, Annex B, ¶ 7. The ICHEIC is not an official executive branch action at all; it is a *voluntary, private* organization in which the United States has the role of a mere observer.

Of the three, only the Swiss-US Joint Statement refers specifically to a policy on gathering information about Holocaust-era insurance policies: the executive branch "will call on the U.S. State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers." Swiss-US Joint Statement, Action Plan § 2.4(b). That is hortatory, not mandatory, wording. But even if we were to assume that a conflict exists between the Holocaust Act and the Swiss-US Joint Statement with regard to seeking information from Swiss insurers,[7] Congress' action controls in this instance. Article I, § 8 of the United States Constitution expressly grants Congress the authority to regulate foreign commerce. Article II, § 2 of the Constitution grants the executive branch the authority, with the consent of the Senate, to make treaties but, as noted, the Swiss-US Joint Statement is not a treaty, and preemption is not an issue here. Plaintiffs' argument that a "policy interest" found in an executive branch "Joint Statement" creating an Economic Commission trumps Congress' express constitutional authority to regulate foreign commerce is incorrect.[8]

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7. It is unclear from the Swiss-US Joint Statement what "investigative initiatives" by "State legislative bodies" are considered to be "*unwarranted*." (Emphasis added.) By implication, states may seek information if the inquiry is "warranted." Arguably, the Holocaust Act is a statement from Congress that statutes like HVIRA are warranted.

8. *Cf.* Louis Henkin, Foreign Affairs and the U.S. Constitution 89 (2d ed. 1996) ("Whatever, then, the President might have authority to do by treaty or other international agreement, he cannot unilaterally regulate commerce with foreign nations. . . .").

In this connection, Plaintiffs draw our attention to letters in which executive branch officials argue that HVIRA does conflict with the federal government's policy concerning Holocaust-era claims. In *Barclays,* the Supreme Court rejected a similar argument. The plaintiff in *Barclays* had pointed to "a series of Executive Branch actions, statements, and amicus filings . . . that, taken together, . . . constitute a clear federal directive proscribing States' use of worldwide combined reporting." 512 U.S. at 328 (citation and internal quotation marks omitted). The Court held that the executive branch's actions "cannot perform the service for which [the plaintiff] would enlist them. The Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.' " *Id.* at 328-29 (quoting U.S. Const. art. I, § 8, cl. 3).

In conclusion, the district court erred when it held that Plaintiffs established a likelihood of success on the question whether HVIRA violates the Commerce Clause.

C. *The Foreign Affairs Power*

The district court also held that Plaintiffs established a probability of success on their claim that HVIRA violates the federal government's power over foreign affairs. The court reasoned, and Plaintiffs argue, that HVIRA has more than an "incidental effect on foreign countries" and has the potential to "disrupt and embarrass" the federal government in the field of foreign relations. We disagree as a matter of law.

Appendix C

1. *Relevant Law*

The federal government's foreign affairs power is not mentioned expressly in the text of the Constitution but, rather, is derived from the structure of the Constitution and the nature of federalism.[9] *See generally* Harold G. Maier, *Preemption of State Law: A Recommended Analysis,* 83 Am. J. Int'l L. 832, 836-37 (1989). The power is rarely invoked by the courts; the Supreme Court has not applied it in more than 30 years, since *Zschernig v. Miller,* 389 U.S. 429 (1968).

The plaintiff in *Zschernig* challenged an Oregon probate law that allowed a foreign citizen to inherit from a decedent's estate only if United States citizens could inherit from a decedent's estate in the foreign citizen's country. The Supreme Court had held in *Clark v. Allen,* 331 U.S. 503, 517 (1947), that a California probate law with a similar reciprocity provision did not, on its face, violate the Constitution, because the statute had only "some incidental or indirect effect in foreign countries." In *Zschernig,* the Court refused to reconsider its facial holding in *Clark,* but held that Oregon's statute, *as applied,* was an unconstitutional "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." 389 U.S. at 432-33.

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9. The foreign affairs power also has been referred to as "dormant foreign relations preemption." Curtis A. Bradley & Jack L, Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position,* 110 Harv. L. Rev. 815, 864 (1997); *see also* Harold Hongju Koh, *Is International Law Really State Law?,* 111 Harv. L. Rev. 1824, 1847 (1998).

Appendix C

The Court in *Zschernig* pointed, with disapproval, to many examples of judges' pontificating on the policies of foreign nations. *Id.* at 433-34. The Court concluded that "the type of probate law that Oregon enforces affects international relations in a persistent and subtle way." *Id.* at 440. The Court observed that " 'international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.' " *Id.* at 441 (quoting *Hines v. Davidowitz,* 312 U.S. 52, 64 (1941)). Here, of course, we address a facial (*Clark*), not an as-applied (*Zschernig*) challenge.

The parties call our attention to two more recent cases in which other circuit courts have confronted a foreign affairs challenge. In *National Foreign Trade Council v. Natsios,* 181 F.3d 38, 51-52 (1st Cir. 1999), the First Circuit held that a Massachusetts law that prohibited state agencies from purchasing goods from companies doing business with a specific country, Burma (the Burma Law), violated the foreign affairs power, the dormant Commerce Clause, and the Supremacy Clause. Notably, the Supreme Court affirmed the First Circuit's ruling that the Burma Law was preempted by federal law under the Supremacy Clause, but the Court did not rule on the foreign affairs question. *Crosby v. National Foreign Trade Council,* 120 S. Ct. 2288, 2294-95 n.8 (2000).

In *Trojan Technologies, Inc. v. Pennsylvania,* 916 F.2d 903 (3d Cir. 1990), a Canadian corporation argued that a Pennsylvania "Buy American" law violated the foreign affairs power. The Third Circuit held that the statute did not violate the Commerce Clause, the Supremacy Clause, or the foreign

affairs power. The court reasoned that "any state law that involves the state in the actual conduct of foreign affairs is unconstitutional," but "any action that has only some incidental or indirect effect in foreign countries" is not. *Id.* at 913 (citation and internal quotation marks omitted). The court then held that the "Buy American" statute "exhibits none of the dangers attendant on the statute reviewed" in *Zschernig*, because: (1) Pennsylvania's statute provided no opportunity for state officials to comment on the nature of foreign regimes; (2) the Pennsylvania statute, on its face, did not single out any particular foreign country; (3) there was no evidence that the statute had been applied selectively according to attitudes concerning foreign policy; and (4) there was evidence that Congress had recently directed its attention to "Buy American" statutes, but did not take steps to preempt them.[10] *Id.* at 913-14; *see also K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 381 A.2d 774, 784 (N.J. 1977) (holding that New Jersey's "Buy American" statute did not violate the foreign affairs power because it did not "result demonstrably in a significant and direct impact upon foreign affairs"). *But see Bethlehem Steel Corp. v. Board of Comm'rs*, 276 Cal. App. 2d 221, 225-27 (Ct. App. 1969) (holding that a California "Buy American" statute violated the foreign affairs power).

2. *Zschernig Does Not Apply to HVIRA*

We are not persuaded that *Zschernig* applies to HVIRA. In *Zschernig*, the Oregon probate statute violated the foreign

10. The *Trojan* court's fourth reason echoes the reasoning of the foreign commerce cases, *Barclays* and *Wardair Canada*, discussed, in Part B(3), above.

affairs power because, *as applied,* it allowed Oregon judges to insult foreign nations. 389 U.S. at 433-35. In *Clark,* the Court held that a similar California statute, *on its face,* did not violate the Constitution. *See Zschernig,* 389 U.S. at 432 (noting that, in *Clark,* the Court held that "a general reciprocity clause did not on its face intrude on the federal domain"). HVIRA regulates insurance companies that do business in California and are, or are related to, companies that issued Holocaust-era insurance policies. No Plaintiff is a foreign government, nor is any Plaintiff owned in whole or in part by a foreign government; they are, simply, businesses. Unlike the statute considered in *Natsios,* HVIRA does not refer to any particular country. As in *Trojan,* there is no evidence that HVIRA would be applied in a way that would implicate the diplomatic concerns mentioned in *Zschernig.*

Because *Zschernig* has been applied so sparingly, because *Clark* remains intact, and because the Supreme Court's foreign commerce cases have taken a different approach (as we discussed above), we hesitate to apply *Zschernig* to a facial challenge to state statutes involving "foreign affairs" (a) but that mainly involve foreign commerce and (b) that are not directed at a particular country. HVIRA, on its face, involves commerce alone, and it is not, on its face, directed at any particular foreign country. For those reasons, we conclude that *Zschernig* does not govern.

D. *The Due Process Clause Claim*

Plaintiffs Generali and Winterthur argue that HVIRA violates the "legislative prong" of the Due Process Clause, which "limits the power of a forum state to apply its sub-

stantive law to factual and legal situations with which it has little or no contact." Additionally, Winterthur argues that HVIRA "violates the most basic notions of fundamental fairness" because it takes "away the licenses of California insurers for failure to perform tasks that are literally impossible." Moreover, Winterthur asserts, the reporting requirement is "arbitrary and irrational."

Plaintiffs cite a recent case, *Gerling Global Reinsurance Corp. v. Nelson,* 123 F. Supp. 2d 1298, 1303-04 (N.D. Fla. 2000), in which the District Court for the Northern District of Florida held that a Florida Holocaust-era insurance statute violates the legislative prong of the Due Process Clause. The court noted that, under Eleventh Circuit precedent, there must be " 'some minimal contact between a State and the regulated subject before it can, consistently with the requirements of due process, exercise legislative jurisdiction.' " *Id.* at 1301 (quoting *American Charities for Reasonable Fundraising Reg., Inc. v. Pinellas County,* 221 F.3d 1211, 1216 (11th Cir. 2000)).

It is possible that HVIRA violates the Due Process Clause, but the district court did not reach that issue, and it is not fully developed in the record or in the briefs presented to this court. We leave the preliminary injunction in place in order to give the district court an opportunity to consider whether Plaintiffs are likely to succeed on the merits.[11]

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11. Defendant acknowledged at oral argument that a serious question may exist concerning HVIRA and the Due Process Clause. When questioned about whether HVIRA requires that the Commissioner suspend the license of a California insurer who is

(Cont'd)

(Defendant does not challenge the district court's conclusion that Plaintiffs established a likelihood of irreparable harm; they may lose the right to continue to do business in California if the statute takes effect.)

CONCLUSION

We hold that the district court erred when it decided that HVIRA violates the dormant Commerce Clause and the foreign affairs power. However, because the district court has not addressed Plaintiffs' claim that HVIRA violates the Due Process Clause, we leave the preliminary injunction in place and remand for further proceedings.

Preliminary injunction AFFIRMED; REMANDED for further proceedings.

(Cont'd)

unable to produce the information required by HVIRA, either because of European privacy laws or because the company has no control over the information, counsel stated that HVIRA requires the suspension of the license nonetheless. Counsel then said that the issue "is really a due process issue" and that any evidence of a company's inability to produce information should be evaluated "as part of a due process analysis, and that's where we think that issue properly lies."

APPENDIX D — MEMORANDUM AND ORDER; PRELIMINARY INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED AND FILED JUNE 9, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NO. CIV. S-00-0506 WBS JFM

GERLING GLOBAL REINSURANCE CORP. OF AMERICA, et al.,

Plaintiffs,

v.

CHUCK QUACKENBUSH in his capacity as COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA,

Defendant.

NO. CIV. S-00-0613 WBS JFM

AMERICAN INSURANCE ASSOCIATION and AMERICAN RE-INSURANCE CO.,

Plaintiffs,

v.

CHUCK QUACKENBUSH in his capacity as COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA,

Defendant.

Appendix D

NO. CIV. S-00-0779 WBS JFM

WINTERTHUR INTERNATIONAL AMERICA INSURANCE CO., et al.,

Plaintiffs,

v.

CHUCK QUACKENBUSH in his capacity as COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA,

Defendant.

NO. CIV. S-00-0875 WBS JFM

ASSICURAZIONI GENERALI S.p.A.,

Plaintiff,

v.

CHUCK QUACKENBUSH in his capacity as COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA,

Defendant.

Appendix D

MEMORANDUM AND ORDER; PRELIMINARY INJUNCTION

In October 1999, California enacted the Holocaust Victim Insurance Relief Act ("HVIRA"). *See* Cal. Ins. Code §§ 13800-13807 and accompanying regulations, Cal. Code Regs. Tit. 10 §§ 2278-2278.5.[1] The stated purpose of the HVIRA is for insurance companies doing business in the State of California to ensure that "any involvement they or their related companies may have had with insurance policies of Holocaust victims are disclosed to the state and to ensure the rapid resolution of these questions, eliminating further victimization of these policyholders and their families." Cal. Ins. Code § 13801(e). Each set of plaintiffs has moved against defendant Chuck Quackenbush, the California Commissioner of Insurance, for a preliminary injunction against enforcement of the HVIRA and accompanying regulations on the grounds that they are unconstitutional and that such enforcement will cause plaintiffs irreparable harm. *See* Fed. R. Civ. P. 65.[2]

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1. Some of the plaintiffs use the term "HVIRA" to refer to all statutes related to California Insurance Code sections 13800-13807, including California Insurance Code section 790.15 and California Code of Civil Procedure section 354.5. In fact, the latter two sections were enacted before Insurance Code sections 13800-13807 and are not part of the HVIRA. When the court uses the term "HVIRA," it refers only to California Insurance Code sections 13800-13807 and the accompanying regulations.

2. Gerling additionally moves for a preliminary injunction against enforcement of California Civil Procedure Code section 354.5 and California Insurance Code section 790.15. The court dismisses Gerling's motion as to these two claims. (*See* Order re: Motion to Dismiss, filed

(Cont'd)

Appendix D

I. *Facts*

A. *The Statutes*

The disputed statutes and regulations relate to claims asserted by Holocaust victims or their heirs or beneficiaries for coverage under insurance policies issued in Europe between 1920-1945. After the National Socialist (NAZI) party came to power, it enacted a series of statutes authorizing governmental confiscation of Jewish property and other assets, including insurance proceeds. Under these NAZI statutes, German insurers were required to pay the proceeds of insurance policies of Jewish residents to "blocked accounts" controlled by the NAZI government. A 1943 statute ordered confiscation of the estates of deceased Jews. Further, although many Holocaust victims had insurance policies, many lost the papers during their imprisonment. In many cases, the persons most knowledgeable about the policy were killed, leaving heirs without a paper trail. As a result, many Holocaust victims and their descendants and heirs have never collected on insurance policies.

The HVIRA requires insurance companies doing business in California to file reports disclosing policies issued

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(Cont'd)

concurrently.) Hence, the court only considers the parties' motions for preliminary injunction against enforcement of the HVIRA.

Gerling also moves for summary judgment on the same claims discussed in its motion for preliminary injunction. Because discovery is incomplete, and defendant has not responded to that motion, the court does not consider it at this time. See Fed. R. Civ. P. 56(f).

in Europe during the period 1920-1945. *See* Cal. Ins. Code §§ 13800-13807. Other statutes extend the statute of limitations for filing such claims (Cal. Civ. Proc. Code § 354.5), and suspend the license of insurance companies who have not paid valid claims (Cal. Ins. Code § 790.15).

1. *California Insurance Code §§ 13800-13807 ("HVIRA")*

The HVIRA obligates insurers doing business in California to file reports identifying insurance policies (life, property, liability, health, annuities, dowry, educational, or casualty) sold to persons in Europe between 1920 and 1945 directly or through a "related company." Cal. Ins. Code § 13804(a). A "related company" is "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer." Cal. Ins. Code § 13802(b). Specifically, the statute requires the insurer or related company to file with the registry: (1) the number of those insurance policies; (2) the holder, beneficiary, and current status of those policies; and (3) the city of origin, domicile, or address for each policy holder. *See* Cal. Ins. Code § 13804(a). Further, with regard to each policy, the insurer must certify one of the following: (1) that the proceeds of the policies have been paid to the designated beneficiaries or their heirs where that person or persons, after diligent search, could be located and identified; (2) that the proceeds where the beneficiaries or heirs could not, after diligent search, be located or identified, have been distributed to Holocaust survivors or to qualified charitable nonprofit organizations for the purpose of assisting Holocaust survivors; (3) that a court of law has certified in a legal

proceeding resolving the rights of unpaid policyholders, their heirs, and beneficiaries, a plan for the distribution of the proceeds; or (4) that the proceeds have not been distributed and the amount of those proceeds. *See* Cal. Ins. Code § 13804(b).

Under the regulations, these reports were to be filed on or before April 7, 2000. *See* Cal. Code Regs. § 2278.4. Under the statute, if the reports were not filed by the 210th day after the HVIRA became effective (May 7, 2000), the Commissioner "shall suspend the certificate of authority to conduct insurance business in the state. . . ." Cal. Ins. Code § 13806.[3]

2. *California Civil Procedure Code § 354.5*

Under this statute, any Holocaust victim or heir or beneficiary who resides in the state may bring a legal action to recover on any claim arising out of an insurance policy or policies purchased or in effect in Europe before 1945 from an insurer (defined term), "notwithstanding any other provision of law." Cal. Civ. Proc. Code § 354.5(b). Further, it forbids dismissal of any claim whether brought by a resident or nonresident on statute of limitations grounds as long as the action is commenced on or before December 31, 2010. *See* Cal. Civ. Proc. Code § 354.5(c).

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3. Defendant has represented that he will not attempt to enforce the statute against plaintiffs until 20 days after the motions for preliminary injunction have been heard.

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3. *California Insurance Code § 790.15*

This statute modifies the Insurance Code to empower the Insurance Department of the State of California to suspend the license of an insurer admitted to do business in California if the Department concludes that an "affiliate" of the insurer has failed to pay any valid claim from Holocaust survivors.

B. *International Negotiations*

The federal government, along with foreign governments and insurance companies, is also grappling with the same goal of giving Holocaust victims some compensation for lost monies from insurance policies.

The United States and German governments have recently negotiated the formation of the Foundation for Remembrance, Responsibility, and the Future ("Foundation") funded by the German government and German corporations to resolve the claims of Holocaust victims. The Foundation is capitalized with approximately $5 billion dollars toward payments of victims of slave and forced labor, as well as payments on asserted claims related to insurance, banking, taking of property, and medical experiments. In a December 13, 1999 letter to Chancellor Schroeder, President Clinton stated that the executive agreement between the two countries shall state that the "Foundation should be regarded as the exclusive remedy for all claims against German companies arising out of the Nazi era." (American: Sullivan Decl.

Ex. 6, 12/13/99 Clinton letter to Schroeder).[4] Deputy Secretary of the Treasury Stuart Eizenstat is the principal representative of the United States on these issues.

A second organization, the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), chaired by former Secretary of State Lawrence Eagleburger, was established as a voluntary organization between European regulators, major European insurance companies, representatives of Jewish and Holocaust survivor organizations, Israel, and the National Association of Insurance Commissioners in the United States. Generali and the Winterthur plaintiffs are members.

The framework for the ICHEIC is set out in a Memorandum of Understanding ("MOU"). Among other things, the MOU provides that the ICHEIC shall conduct an investigatory process to determine the current status of insurance policies issued to Holocaust victims for which claims are filed with the ICHEIC and shall establish a claims process to settle and pay individual claims. (American: Sullivan Decl. Ex. 13, MOU). Eizenstat told the House Banking Committee that "[t]he U.S. Government has supported the International Commission on Holocaust Era Insurance Claims since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era." (Winterthur: Grimm Decl. Ex. I, Eizenstat 2/9/00 at House Banking Committee

4. Many of the exhibits appear in some or all of the various plaintiffs' papers. The court will only cite to one location of each exhibit.

hearing).[5] It is expected that the German Foundation will recognize the ICHEIC as the exclusive mechanism for resolving insurance claims. (Winterthur: Grimm Decl. Ex. I, Eizenstat 2/9/00 at House Banking Committee hearing).[6]

C. *The Parties*

Plaintiffs in all four cases are insurance companies licensed to do business in California. Each set of plaintiffs alleges that the statutes are unconstitutional. In all four cases,

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5. Defendant objects that Eizenstat's statement lacks foundation and is inadmissible hearsay. At the preliminary injunction stage, however, the court may consider hearsay. "The urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to testify at trial. The trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial." *Flynt Distrib. Co., Inc. v. Harvey,* 734 F.2d 1389, 1394 (9th Cir.1984). Consequently, the court does not discuss each of defendant's evidentiary objections.

6. The plaintiffs also discuss a 1995 agreement between the United States and Germany to "settle compensation claims by certain United States nationals who suffered loss of liberty or damage to body or health as a result of National Socialist measures of persecution directly against them." This agreement provided for two separate payments by Germany in settlement of the claims. In return for the payments by the German government, the United States "declare[d] all compensation claims against the Federal Republic of Germany by United States nationals for damage within the meaning of [the Agreement] to be finally settled." This Agreement, although related in topic, is not directly applicable because it deals with claims against Germany, not against insurance companies, and does not appear to involve insurance claims.

defendant is Chuck Quackenbush in his capacity as the Commissioner of Insurance of the State of California.

1. *Gerling Global Reinsurance Corporation of America ("Gerling")*

Plaintiffs are five insurance companies licensed to do business in California. They are "related to" or "affiliated" with two German companies (Gerling- Konzern Allgemenine Versicherungs-AG ("GKA") and Gerling-Konzern Lebensversicherungs-AG ("GKL") that issued policies in Europe during the proscribed time period. Hence, they have to file reports. Gerling alleges that the HVIRA is unconstitutional under: (1) the constitutional grant of authority to the federal government over foreign affairs; (2) the Commerce Clause; (3) the Due Process Clause; (4) Bill of Attainder; (5) the Fourth Amendment; and (6) the Contracts Clause.

2. *American Insurance Association and American Re-Insurance Co. (together, "American")*

Plaintiffs are American Insurance Association ("AIA") and American Reinsurance Company ("AmRe"). AIA principally represents American insurance companies that did not issue insurance policies in Europe during the relevant period and do not own or control any companies that did.[7] Five members of AIA are related to European companies that issued the applicable policies. AmRe is a large

7. Assicurazioni Generali, a European Company, is also represented by American Insurance, but files its own motion for preliminary injunction.

insurance company licensed to do business in California. AmRe claims that neither it, nor any subsidiary or affiliate over which it has control, issued insurance policies that were in effect in Europe during 1920-1945.

American claims that the statutes are unconstitutional for three reasons: (1) the HVIRA treads on the federal government's exclusive power to conduct foreign relations; (2) the HVIRA violates the Foreign Commerce Clause; and (3) the HVIRA violates the Due Process clause.

3. *Winterthur International American Insurance Co., et al. (together, "Winterthur")*

Plaintiffs are nine insurance companies licensed to do business in California. None of the companies ever issued insurance policies in Europe during the applicable time period, though each is "related" to such a company. Each plaintiff claims, however, that it is not in possession, custody, or control of any records pertaining to insurance companies sold by "related companies."

Winterthur argues that the HVIRA is unconstitutional because: (1) it is an unconstitutional invasion of the federal government's foreign affairs power; (2) it violates the Dormant Commerce Clause; (3) it violates the Due Process Clause; (4) it deprives plaintiffs of rights secured by the Equal Protection Clause; (5) it is an unconstitutional bill of attainder; and (6) implementation constitutes an unreasonable search and seizure.

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4. *Assicurazioni Generali, S.p.A ("Generali")*

Generali is an Italian insurance company that issued insurance policies in Europe during the applicable time period. Generali is represented by the AIA, but has filed separately because it claims that the Insurance Commissioner has singled it out for attack, even though it has been paying insurance claims from Holocaust victims for the last several years.

Generali claims the HVIRA unconstitutionally violates the Due Process and Commerce Clauses and invades the foreign affairs power of the federal government.

D. *Threatened Enforcement*

The Commissioner has actively threatened enforcement against all plaintiffs. He subpoenaed many insurance companies, including plaintiffs and those represented by plaintiffs, to appear at a hearing on December 1, 1999. At the hearing, Quackenbush informed the insurance companies, "[t]his issue will be resolved in California. I promised that for the last two years. And on April 6th, you're going to see just how serious California is if you have not complied with this law." (Generali: Tiberini Decl., Ex. 10, Transcript of 12/1/99 Investigatory Hearing, 14:16-20). He told Generali specifically, "I want you to take back to your officers in Italy and everywhere else, that you might want to consider seriously leaving the State, because it's obvious to me right now that you have no intention of complying with the law." (Generali: Tiberini Decl., Ex. 10, Transcript of 12/1/99 Investigatory Hearing, 49:12-16).

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At the end of questioning Generali, Quackenbush stated generally, "[i]t is your choice now whether you're going to work with this Department of Insurance to bring your company in full compliance, whether you're going to leave the state voluntarily, or whether I'm going to kick you out. That's your three choices." (Generali: Tiberini Decl., Ex. 10, Transcript of 12/1/99 Investigatory Hearing, 51:19-23).

II. *Standard*

"To obtain a preliminary injunction, a party must establish either: (1) probable success on the merits and irreparable injury, or (2) sufficiently serious questions going to the merits to make the case a fair ground for litigation with the balance of hardships tipping decidedly in the movant's favor." *See Baby Tam & Co. v. City of Las Vegas,* 154 F.3d 1097, 1100 (9th Cir. 1998). These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. *See id.* The movant has the burden of proving each element of either test. *See Prescott v. County of El Dorado,* 915 F. Supp. 1080, 1084 (E.D. Cal. 1996).

Under the doctrine of *Ex Parte Young,* 209 U.S. 123 (1908), it is appropriate for a party to move for a preliminary injunction in federal court against state officers "who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution. . . ." *Id.* at 156. A preliminary injunction is particularly appropriate when the moving party is faced with a "Hobson's choice" of continuing to violate the law, thus exposing itself to huge

liability, or to "violate the law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings and any further review." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992).

III. *Probability of Success on the Merits*

Among them, the various plaintiffs make seven claims regarding the constitutionality of the statutes. They claim that the statutes violate: (1) the constitutional grant of authority to the federal government over foreign affairs (all parties); (2) Commerce Clause (all parties); (3) the Due Process Clause (all parties); (4) Bill of Attainder (Gerling and Winterthur); (5) the Fourth Amendment (Gerling and Winterthur); (6) the Contracts Clause (Gerling); and (7) Equal Protection (Winterthur). The court finds that plaintiffs have established a probability of success under the foreign affairs doctrine and the Commerce Clause. Accordingly, the court limits its analysis to these claims, and it is unnecessary to address the other claims.

A. *Foreign Affairs*

The framers of the Constitution made clear that the federal government was to have supreme power in the general field of foreign affairs. *See Hines v. Davidowitz*, 312 U.S. 52, 62 (1941). James Madison, in addressing the people of the State of New York, explained that the proposed Constitution contained a "class of powers, lodged in the general government, consist[ing] of those which regulate the intercourse with foreign nations. . . . This class of powers forms an obvious and essential branch of the federal

administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations." Madison, *The Federalist Papers,* No. 42. Alexander Hamilton wrote, regarding the power of the federal judiciary over laws which involve the peace of the confederacy: "the peace of the WHOLE ought not be left at the disposal of a PART. The Union will undoubtably be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever be accompanied with the faculty of preventing it." Hamilton, *The Federalist Papers,* No. 80.[8]

The Supreme Court has clarified the federal government's control over foreign affairs. "The Constitution entrusts [the nation's foreign affairs and international relations] solely to the Federal Government." *Zschernig v. Miller,* 389 U.S. 429, 436 (1968). "Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink,* 315 U.S. 203, 233 (1942). "Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines,* 312 U.S. at 63.

Zschernig is the most recent case addressing the issue of foreign affairs. This case involved an Oregon probate law that conditioned inheritance rights of a nonresident alien upon the alien's ability to demonstrate that his country of origin

8. *See also The Federalist Papers* Nos. 3, 4. Here, John Jay discusses the importance of the national government in relation to keeping the peace with foreign powers.

would grant reciprocal rights to a U.S. citizen and would not confiscate any of the inherited property. *See Zschernig*, 389 U.S. at 430-431. The Court held that the statute "affect[ed] international relations in a persistent and subtle way," *id.* at 440, had "great potential for disruption or embarrassment," *id.* at 435, and had "more than some incidental or indirect effect in foreign countries," *id.* at 434. Thus, the statute intruded into "matters which the Constitution entrusts solely to the Federal Government." *Id.* at 436.[9]

1. *The HVIRA's Goal is International in Nature*

The stated goal of the HVIRA is to exercise a power exclusively entrusted to the national government. The statute states that "[t]his chapter is necessary to . . . encourage the development of a resolution to these [insurance claim] issues through the international process or through direct action by the State of California, as necessary." Cal. Ins. Code § 13801(f). Encouraging resolution through an international process clearly implicates matters of foreign affairs, and, as such, is a function vested in the national government.

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9. The First Circuit applied and interpreted *Zschernig* in *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *cert. granted*, 120 S. Ct. 525 (1999). There, the First Circuit declared unconstitutional a Massachusetts law which restricted the ability of Massachusetts and its agencies to purchase goods or services from companies that do business with Burma. *See id.* The First Circuit held that the law had "more than an incidental or indirect effect in foreign countries," *Natsios*, 181 F.3d at 52 (quoting *Zschernig*, 389 U.S. at 434), and a "great potential for disruption or embarrassment" as evidenced by the protests of America's trading partners, *id.* at 54 (quoting *Zschernig*, 389 U.S. at 435).

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2. *Effects on International Relations and Potential for Disruption and Embarrassment*

Plaintiffs have demonstrated a probability that the HVIRA affects international relations. The United States federal government has been actively involved in compensating Holocaust victims since the end of World War II. In 1952, the United States was a party to a treaty among France, England, the United States, and Germany transferring to the Federal Republic of Germany the responsibility for implementing reparations. "The Federal Republic [of Germany] acknowledges the obligation to assure . . . adequate compensation to persons persecuted for their political convictions, race, faith or ideology, who thereby have suffered damage to life, limb, health, liberty, property, their possessions or economic prospects (excluding identifiable property subject to restitution)." (Gerling: Appendix of Authorities, Ex. A, Transition Agreement, Ch. 4 ¶ 1). Since that treaty, the United States has been actively involved in Holocaust victims compensation efforts. The HVIRA has a strong potential of interfering with these efforts.

First, the HVIRA has the real potential of frustrating the United States' efforts in negotiating the German Foundation. This Foundation, capitalized at close to $5 billion, will provide payments to victims of slave and forced labor as payments on asserted claims related to insurance, banking, taking of property, and medical experiments. On December 17, 1999, Secretary of the Treasury Stuart Eizenstat, the Special Representative of the Secretary of State and the President on Holocaust-Related Issues Senate Foreign

Relations Committee, stated that "[i]n the context of a comprehensive German Foundation, in all cases, consensual and non-consensual, brought against German companies for claims arising out of the Nazi-era, we are prepared to say that the German Foundation should be regarded as the exclusive remedy and that dismissal of such cases would be in our foreign policy interests." (American: Sullivan Decl. Ex. 11, 12/17/99 Press Release).[10] The German Foundation cannot be the exclusive remedy if California's HVIRA is also applicable.

Second, the HVIRA has a potentially negative effect on the ICHEIC, which is a voluntary organization of European regulators, major European insurance companies, representatives of Jewish and Holocaust survivor organizations, Israel, and the National Association of Insurance Commissioners in the United States insurance companies. The ICHEIC investigates Holocaust era insurance policies and helps settle claims. Eizenstat wrote Quackenbush in November 1999 that the HVIRA "has the unfortunate effect of damaging the one effective means now at hand to process quickly and completely unpaid insurance claims from the Holocaust period, the International Commission on Holocaust Era Insurance Claims. . . ." (American: Sullivan Decl. Ex. 24, 11/30/99 Eizenstat letter to Quackenbush). Further, Eizenstat informed Quackenbush, "you should know that actions by California, pursuant to this law, have already threatened to damage the cooperative spirit which the

10. Defendant argues that the German Foundation is not in place, and thus is not a federal policy. However, the very negotiation for a German Foundation dedicated toward compensation implicates foreign policy.

International Commission requires to resolve the important issue for Holocaust survivors." (American: Sullivan Decl. Ex. 24, 11/30/99 Eizenstat letter to Quackenbush). Eizenstat wrote Governor Davis on the same day, stating, "actions by California, pursuant to this law, have already potentially damaged and could derail both a settlement of forced and slave labor negotiations and the progress already achieved by the International Commission on Holocaust Era Insurance Claims. . . ." (American: Sullivan Decl. Ex. 23, 11/30/99 Eizenstat letter to Governor Davis).

Former Secretary of State Lawrence Eagleburger, the chair of the ICHEIC, testified that he believes that under the terms of the MOU under which the ICHEIC was organized, each insurance company that signed the MOU and is fully cooperating in the ICHEIC process "is entitled to receive, and should receive," an exemption from the enforcement of legislation such as the HVIRA. (Winterthur: Eagleburger Decl. ¶ 12). Section 10 of the MOU requires signatories to "work to achieve exemptions from related pending and future legislation . . . for those insurers that become signatories to this MOU and which fully cooperate with the processes and funding of the IC." (Winterthur: Eagleburger Decl. Ex. A.). ICHEIC members include plaintiffs Winterthur and Generali.

Third, the HVIRA potentially conflicts with the January 29, 2000 Joint Statement issued by the United States and Swiss governments at the inaugural meeting establishing the Swiss-US Joint Economic Commission ("Joint Statement"). Specifically, in the Action Plan attached to the Joint Statement, the United States government promised to "call on the U.S. State insurance Commissioners and State

legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers." (Winterthur: Thalmann Supp. Decl. Ex. A, Joint Statement Action Plan at 3).

Finally, the HVIRA potentially conflicts with the national goal of creating "enduring legal peace." Eizenstat referred to this goal in his November 30, 1999 letter to Governor Davis. With regard to the German Foundation, Eizenstat stated, "[c]learly, for this deal to work . . . German industry and German government need to be assured that they will get 'legal peace', not just from class-action lawsuits, but from the kind of legislation represented by the California Victim Insurance Relief Act." (American: Sullivan Decl. Ex. 23, 11/30/99 Eizenstat letter to Governor Davis). President Clinton and Secretary of State Madeline Albright each echoed this sentiment several weeks later as the negotiations for the German Foundation began to close. President Clinton, in a December 13, 1999 letter to Chancellor Schroeder, wrote that "the Foundation should be regarded as the exclusive remedy for all claims against German companies arising out of the Nazi era. [The executive agreement] will state further that both our countries desire all embracing and enduring legal peace to advance our foreign policy interests." (American: Sullivan Decl. Ex. 6, 12/13/99 Clinton letter to Schroeder). Albright, when addressing the Slave Labor Meeting in Berlin on December 17, 1999 stated in relation to the German Foundation that "[t]he United States is agreeing to assist in providing legal peace to German companies, both in our courts and from state and local action. To succeed in achieving legal peace, it is essential that the Foundation be comprehensive." (American: Sullivan Decl. Ex. 9, 12/17/99 Albright remarks).

By conflicting so directly with the national government's policies and promises, the HVIRA not only affects international relations, but also has "great potential for disruption or embarrassment." *See Zschernig,* 389 U.S. at 435. The HVIRA is inconsistent with Eizenstat's statements regarding the German Foundation as the exclusive remedy for claims from the Nazi era. It conflicts with the cooperative spirit of the ICHEIC, which the United States supports. The HVIRA makes the United States' promises in the U.S.-Swiss Joint Economic Statement appear to be unfulfilled. Finally, "legal peace" cannot be achieved if California and each of the other states are free to enact their own legislation forcing companies to report insurance policies or lose their license. *See* Cal. Code Ins. §§ 13800-13807.

Defendant argues that plaintiffs "have not demonstrated that the Holocaust Statutes have an actual direct impact on foreign relations. Indeed, plaintiffs cannot point to any federal policy enactments that the Holocaust Statutes must give way to." (Opp'n. at 84). Defendant then cites to the declarations of Robert Brown, the representative of the Minister of Israeli Society in the World Jewish Community, Linda Gerstel, a shareholder in a law firm representing Holocaust victims in class action insurance cases, and Leslie Tick, staff counsel to the Department of Insurance, and an attorney for defendant.[11] Brown states that he took part in the negotiations of the German Foundation settlement and claims that he does "not believe that the [HVIRA] interfered with the negotiations of the Germany Foundation settlement."

11. Plaintiffs object on numerous grounds to parts of all three declarations. Because the court does not rely on the declarations, the court does not address the objections.

(Opp'n.: Brown Decl. ¶ 6). Gerstel testified that she participated in the German Foundation negotiations and states that "[n]othing in the negotiations . . . was intended to effect or nullify the powers of the State Insurance Commissioners or any related regulatory scheme including, but not limited to, legislation enacted in California." (Opp'n.: Gerstel Decl. ¶ 7). Tick described the formation of the ICHEIC and its work. Defendant has not made clear which portion of her lengthy declaration and exhibit supports defendant's claim.

Defendant's argument is wholly unpersuasive. First of all, as discussed above, several policy makers in the Executive Branch have clearly stated the United States' position with regard to the compensation of Holocaust victims. The fact that several participants in the German Foundation negotiations stated that they do not think that negotiations were compromised by the California statutes is irrelevant. The German Foundation negotiations are simply an illustration of potential foreign affairs that could be affected by the HVIRA. In any case, even if the HVIRA did not actually affect the negotiations, it certainly has the potential to affect foreign affairs *and* it is embarrassing to the United States to have individual states enacting legislation inconsistent with Executive promises and negotiations. *See Zschernig,* 389 U.S. at 435. Thus, the HVIRA interferes with the national government's exclusive power over external affairs. *See Pink,* 315 U.S. at 233.

Second, there does not have to be a formally stated national policy in order for a state to impermissibly interfere with foreign affairs. Under *Zschernig,* a state statute that affected international relations in "a persistent and subtle

way" was held unconstitutional for impacting the federal government's foreign affairs powers. *Zschernig,* 389 U.S. at 440.

Finally, defendant's argument confuses the preemption doctrine with the foreign affairs power. A state cannot pass statutes that interfere with foreign affairs whether or not the national government has a stated policy. *See Pink,* 315 U.S. at 233 ("Power over external affairs is not shared by the States; it is vested in the national government exclusively.").

Defendant cites to *Clark v. Allen,* 331 U.S. 503 (1947), in support of his argument that plaintiffs must articulate a specific national policy violated by the HVIRA. *Clark,* however, does not stand for such a proposition. In *Clark,* the Supreme Court held that, generally, rights to succession are determined by local law. However, those rights may be affected by an overriding federal policy. *See id.* at 517. In *Clark,* the Court did not find an overriding federal policy, nor did the Court find that the statute had anything more than an "incidental and indirect effect in foreign countries." *See id.* Therefore, the statute did not impermissibly intrude on foreign affairs powers. *Clark* did not require that there be an overriding federal policy. The Supreme Court simply found that there was none.

Defendant further argues that the German Foundation and the ICHEIC are not as comprehensive as the HVIRA with regard to reporting. Defendant points out that the German Foundation does not have a reporting requirement and that the ICHEIC, as a voluntary organization, does not encompass all the insurance companies addressed by the

HVIRA. These assertions may be true. However, foreign affairs remains the province of the national government; the states do not have authority to fill in perceived gaps in international measures as they see fit. The United States must be able to speak with one voice on matters of international concern.

'3. *More than an Incidental Effect on Foreign Countries*

Defendant argues that the effect is on foreign companies, not foreign governments, and thus the HVIRA does not violate the foreign affairs policy. The language of *Zschernig* requires that the statute have "more than some incidental or indirect effect in foreign *countries,"* not foreign governments. *Zschernig,* 389 U.S. at 434. "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted by a government." *Zschernig* 389 U.S. at 441 (quoting *Hines* 312 U.S. at 64).

Plaintiffs have demonstrated a probability of success in showing that the HVIRA has more than some incidental effect in foreign countries. In addition to the interference with foreign commerce and the interference with foreign relations, the immediate effect of the statute is to require foreign companies to do an extensive search of warehouses and then compile a massive report, even if the company's only connection with California is through a subsidiary.

Plaintiffs have also raised a serious issue that the statutes are in conflict with some European Privacy laws.

For example, in its Amicus brief, the Federal Republic of Germany argues that the disclosure of information and documentation by German insurers to the California Insurance Department without the express authorization of policyholders or their beneficiaries could place the German insurers in violation of the Bundesdatenschutzgesetz (German Federal Data Protection Act, "BDSG"). Federal Republic of Germany Amicus Brief at 6). Violation of the BDSG "may result in criminal as well as civil penalties." (Federal Republic of Germany Amicus Brief at 6). Gerling submits the Declaration of Dr. Spiros Simitis, a professor at Yale Law School and a former Data Protection Commissioner of the German State of Hesse. After an extensive analysis of the BDSG, Simitis states that "under present conditions, [Gerling's] German affiliates are not allowed to transfer the data requested." (Gerling: Reif Decl. Ex. 10, Simitis Decl. ¶ 28).[12]

Defendant argues that in fact, the HVIRA and related statutes do not conflict with the BDSG. Defendant submits the declaration of Paul Schwartz, a professor at Brooklyn Law School. Schwartz states that he has been recognized as an expert on data protection law. He disagrees with Simitis' final conclusion and gives his own lengthy interpretation of the BDSG. (Opp'n.: Schwartz Decl. ¶ 6).[13]

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12. Simitis also notes that European Union has a Data Protection Directive which "explicitly affirms the individual's right to determine the use of her or his data." (Gerling Reif Decl. Ex. 10, Simitis Decl. ¶ 11).

13. Defendant also argues that the ICHEIC has already published the names of some German companies policyholders on

(Cont'd)

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There is an obvious dispute as to whether the HVIRA conflicts with the German BDSG and other European laws. The very fact that a state law requires a foreign company to do something that arguably violates the laws of the countries in which it is incorporated or does business shows that the law has an effect on international relations which is more than "incidental."

Plaintiffs have made a persuasive showing that the HVIRA interferes with foreign relations, has great potential for disruption or embarrassment, and has more than an incidental effect in foreign countries. Accordingly, plaintiffs have shown a probability of success on their claim that the HVIRA interferes with the federal government's control over foreign affairs.[14]

(Cont'd)
its website. Defendant argues that it "defies logic" that the ICHEIC would violate German laws. The question is not before the court as to whether the ICHEIC's actions violated German laws.

14. Defendant cites *Trojan Technologies v. Commonwealth of Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990) in an attempt to distinguish *Zschernig*. In *Trojan*, the Third Circuit examined a Pennsylvania "buy American" statute. This statute required agencies of the Commonwealth when constructing public works to include a provision in all contracts that steel used in the projects must be produced in the United States. *See id.* at 904. The Third Circuit found this statute did not interfere with the federal government's exercise of the Foreign Affairs power because "[t]he Pennsylvania statute exhibits none of the dangers attendant on the statute reviewed in *Zschernig*." *Id.* at 913. The Third Circuit noted that the statute was evenhanded in its application, applying to steel from any foreign
(Cont'd)

Appendix D

B. *Commerce Clause*

The Commerce Clause reserves to Congress the right "to regulate commerce with foreign Nations, and among the several States. . . ." U.S. Const. art. 1, § 8, cl. 3. "[E]ven in the absence of specific action taken by the Federal Government," the Commerce Clause limits the powers of states to enact laws regulating interstate or foreign commerce. *Wardair Canada, Inc. v. Florida Dep't. of Revenue,* 477 U.S. 1, 7-8 (1986).

1. *McCarran-Ferguson Act*

State regulation and taxation of insurance is often excepted from Commerce Clause restrictions through the McCarran-Ferguson Act. This Act was passed in the wake of *United States v. South-Eastern Underwriters Association,* 322 U.S. 533 (1944), which held that insurance is "commerce" within the meaning of the Commerce Clause. *See Western and Southern Life v. State Board of Equalization of Cal.,* 451 U.S. 648, 653-654 (1981). Congress, believing "that the business of insurance is 'a local matter, to be subject to and regulated by the laws of the several States,' " enacted

(Cont'd)
source "without respect to whether the source country might be considered friend or foe." *Id.* Here, while the HVIRA is arguably evenhanded, it does exhibit other "dangers" not at issue in *Trojan,* and thus violates the Foreign Affairs power. Among other things, the HVIRA is inconsistent with several of the national government's statements, policies, and promises, and it potentially violates foreign laws. Thus, it affects foreign relations, is potentially disruptive and embarrassing, and has more than incidental effects in foreign countries.

the McCarran-Ferguson Act, which Congress intended to restore state taxing and regulatory powers over the insurance business to their pre *South-Eastern Underwriters* scope. *See id.* at 654 (quoting H.R.Rep. No. 143, 79th Cong., 1st Sess., 2). Specifically, the Act states, "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a).

Defendant thus argues that the HVIRA is exempted from Commerce Clause restrictions by the McCarran-Ferguson Act. The HVIRA, however, does not appear to fall within the scope of regulations intended to be exempted by the Act.

In *Federal Trade Commission v. Travelers Health Association,* 362 U.S. 293 (1960), the Supreme Court held that the Federal Trade Commission could issue a cease and desist order against certain insurance practices by a Nebraska insurance company. The company's activities, selling insurance through an interstate mail order insurance business, were extraterritorial, and thus were not regulated by state law within the meaning of the McCarran-Ferguson Act. *See id.* at 298. Thus, the insurance practices were not immune from federal control. The court stated that it is clear from the debate surrounding the implementation of the McCarran-Ferguson Act "that Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no indication of any thought that a State could regulate activities carried on beyond its own borders." *Id.* at 300.

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The Ninth Circuit discussed the holding in *Travelers* in its opinion in *In re Insurance Antitrust Litigation v. Ace Check Cashing Inc.*, 938 F.2d 919 (1991), *aff'd in part, rev'd in part* by *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993). "[E]stablished law blocks regulation by one state of the United States of the insurance business outside the borders of that state." *Id.* at 928. "[A] state does not have power to regulate in any way contracts of insurance or reinsurance entered into outside its jurisdiction even though the risks covered were risks within the state." *Id.*

Here, the HVIRA attempts to regulate the decision making authority of European insurance companies to pay or not to pay claims on European policies. *See* Cal. Ins. Code. § 13801(f) ("This chapter is necessary to . . . encourage the development of a resolution to these [Holocaust era insurance claim] issues through the international process or through direct action by the State of California."). The HVIRA specifically asks for information about insurance policies sold "directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945." Cal. Ins. Code § 13804(a). Clearly the "State where occurred the activity sought to be regulated" was not California. *Travelers*, 362 U.S. at 300.

Further, in discussing the passage of the McCarran-Ferguson Act, the Supreme Court stated, "[o]ne of the major arguments advanced by proponents of leaving regulation to the States was that the States were in close proximity to the people affected by the insurance business and, therefore, were in a better position to regulate that business than the Federal Government." *Id.* at 302. Although some of the people

affected by the HVIRA may now be California residents, the HVIRA makes no distinction between reporting insurance policies related to California residents and insurance policies related to residents of any other state or foreign county. There is no legitimate reason why California should regulate the reporting of these policies.

Under *SEC v. National Secur. Inc.*, 393 U.S. 453, 460 (1969), licensing companies is considered the "business of insurance" within the meaning of the McCarran-Ferguson Act. However, the gist of the HVIRA is not about licensing insurance companies, but rather about forcing companies to report on insurance policies issued in Europe and using the threat of license suspension as an enforcement mechanism.

The McCarran-Ferguson Act does not insulate the HVIRA from analysis under the Commerce Clause.

2. *Violations of the Commerce Clause*

Plaintiffs have shown a probability that the HVIRA violates the Commerce Clause. Although there is only one Commerce Clause, "state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny" than are regulations on interstate commerce. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984). The section of the commerce clause dealing with foreign commerce is often referred to as "the Foreign Commerce Clause."

Appendix D

a. *One Voice*

The Foreign Commerce Clause is a subset of the broader foreign affairs powers discussed above. "Foreign commerce is pre-eminently a matter of national concern." *Japan Line, LTD. v. County of Los Angeles,* 441 U.S. 434, 448 (1979). "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Id.* "The Federal Government must speak with one voice when regulating commercial relations with foreign governments." *Id.*

The HVIRA potentially prevents the federal government from speaking with one voice in its expectations of foreign insurance companies. Under the HVIRA, foreign insurance companies must conduct an extensive and thorough search for records. *See* Cal. Ins. Code § § 13804(a) and 13804(b). Further, the companies must certify whether or not claims of Holocaust victims have been paid, and must certify whether or not they have searched for the victims. *See* Cal. Ins. Code § 13804(b). These demands emanate not from the national government, but from an individual state, and would be in conflict with the national government's promises to Germany that the German Foundation would be the exclusive relief for claims from Holocaust victims.[15]

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15. Defendant points out that commerce is controlled by Congress, not the Executive Branch. *See Barclays Bank v. Franchise Tax Bd.,* 512 U.S. 298, 329 (1994). However, Congress "may delegate very large grants of its power over foreign commerce to the President, who also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs." *Id.* (internal quotations omitted).

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3. *Commerce Outside State Borders*

The Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Ins.*, 491 U.S. 324 (1989). Defendant argues that the commerce does not take place wholly outside of California's borders. "The critical question is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* (citing *Brown Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

The practical effect of the HVIRA is that insurance companies that sold policies during the applicable time period must make an extensive search of their warehouses to come up with a list of individuals that might include Holocaust victims. It is common sense that most, if not all, of the companies that sold policies in Europe from 1920-1945 were European. They are being asked to gather voluminous European records of policies sold to Europeans and to report these records to California. The required records are not in any way tailored toward California citizens. The only connection to California is that the statute is enforced by taking away the company's or its affiliate's California license and the reporting is done to California. Clearly, California is meddling in foreign commerce entirely outside its borders.

Plaintiffs have shown a probability of success on the merits that the HVIRA violates the Commerce Clause.

Appendix D

C. *Other Constitutional Claims*

Because the court finds that plaintiffs have demonstrated a probability of success on the merits that the HVIRA is unconstitutional based on a violation of the federal foreign affairs power and a violation of the Commerce Clause, the court does not address the remaining constitutional issues.

IV. *Irreparable Injury*

It is the plaintiff's burden to demonstrate that the balance of irreparable harm favors the plaintiff. *See Carribean Marine Servs. Co. v. Baldridge,* 844 F.2d 668, 674 (9th Cir.1988). "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction . . . . a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." Plaintiffs have met this burden.

The required reports under California Insurance Code section 13804 were due April 7, 2000. *See* Cal. Code Regs. § 2278. Under section 13806, if the parties did not file the reports by May 7, 2000, the Commissioner "shall suspend the certificate of authority to conduct insurance business in the state." Cal. Ins. Code § 13806.

Plaintiffs have demonstrated that suspension of their licenses to practice insurance in the state of California would cause them irreparable harm. Such suspension could undermine the goodwill of the company because the market may infer that the company is unstable. Further, a suspension would prevent plaintiffs from being able to renew contracts

for their existing policy holders causing further loss of goodwill. *See Rent-a-Center, Inc. v. Canyon Television and Appliance,* 944 F.2d 597, 603 (9th Cir. 1991) (affirming preliminary injunction and holding that damage to the goodwill of a business supports a finding of irreparable injury).

In addition, suspension is likely to cause reputational injury resulting in a loss of market share. *See United Services Automobile Ass'n v. Muir,* 792 F.2d 356, 362 (3rd Cir. 1986). Suspension might suggest marketplace fraudulent or illegal activity or financial instability. *See id.* Plaintiffs point out that suspending their licenses will imply publicly that the companies are implicated with the wrongdoings of the Holocaust, has acted illegally, or is not financially sound. Indeed, the Commissioner has already made such implications. For example, the California Department of Insurance has a website. One page is dedicated to Winterthur. Next to Winterthur is a picture of a concentration camp. The caption reads, "This company is an affiliate of one of what could be many companies that have outstanding, unpaid claims owed to Holocaust survivors, their heirs and beneficiaries, for life and property loss resulting from the atrocities committed during the Holocaust. It is time for justice." (Winterthur: Smith Decl. Ex 1; *http://www.insurance.ca.gov/docs/FS-Holocaust.htm.* Suspending Winterthur's license would further implicate the company, causing irreparable harm. *See Ross-Simons, Inc. v. Baccarat, Inc.,* 102 F.3d 12, 20 (1st Cir. 1996) ("By its very nature injury to goodwill and reputation is not easily measured or fully compensable in damages. Accordingly, this kind of harm is often held to be irreparable.").

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The public interest is also an important factor to be considered in a suit for injunctive relief affecting the public interest. *See Miller v. California Pac. Med. Ctr.*, 991 F.2d 536, 540 (9th Cir. 1993). If plaintiffs' licenses are suspended, the companies would not be able to write any new business in California. Although they would be obligated to service claims on existing policies until those policies expired by their natural terms, the companies would not be able to modify or renew the existing policies. For example, if a policyholder wanted to increase her policy limits, she would not be able to do so.

In many cases, the existing policy will expire within the year. At the end of the year, policyholders will be scrambling to find new insurers. This task could become more difficult due to the decreased number of insurance companies in the state as a result of the suspension provisions of the HVIRA.

Finally, license suspension would undoubtably affect the insurance companies' employees. Companies that could no longer write policies in California would likely have to lay off or fire their employees engaged in underwriting and sales. Plaintiffs have demonstrated that irreparable harm will likely occur if the HVIRA is enforced.

V. *Conclusion*

None of the plaintiffs deny that the Holocaust was a terrible atrocity. And none of the plaintiffs deny that the victims and their heirs and beneficiaries should be compensated to the extent possible. However, even though the end goal of such compensation is laudable, this goal may

not be achieved through unconstitutional means. Plaintiffs have shown a probability of success on the merits of their claim and have shown that irreparable harm will occur if the court does not enjoin enforcement of the HVIRA.

IT IS THEREFORE ORDERED that plaintiffs motions for preliminary injunction be, and the same hereby are, GRANTED.

Pending final judgment in these actions, defendant is enjoined from enforcing the provisions of the Holocaust Victim Insurance Relief Act and the accompanying regulations. Cal. Ins. Code §§ 13800-13807 and Cal. Code Regs. §§ 2278-2278.5.

s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

APPENDIX E — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Appendix E

Cal. Ins. Code § **13800** (2001)

§ **13800**. Short title

This chapter shall be known and may be cited as the Holocaust Victim Insurance Relief Act of 1999.

Appendix E

Cal. Ins. Code § **13801** (2001)

§ **13801**. Findings

The Legislature finds and declares the following:

(a) During World War II, untold millions of lives and property were destroyed.

(b) In addition to the many atrocities that befell the victims of the Nazi regime, insurance claims that rightfully should have been paid out to the victims and their families, in many cases, were not.

(c) In many instances, insurance company records are the only proof of insurance policies held. In some cases, recollection of those policies' very existence may have perished along with the Holocaust victims.

(d) At least 5,600 documented Holocaust survivors are living in California today. Many of these survivors and their descendents have been fighting for over 50 years to persuade insurance companies to settle unpaid or wrongfully paid claims. Survivors are asking that insurance companies come forth with any information they possess that could show proof of insurance policies held by Holocaust victims and survivors, in order to ensure that closure on this issue is swiftly brought to pass.

(e) Insurance companies doing business in the State of California have a responsibility to ensure that any involvement they or their related companies may have had with insurance policies of Holocaust victims are disclosed to the state and to ensure the rapid resolution of these questions, eliminating the further victimization of these policyholders and their families.

(f) The international Jewish community is in active negotiations with responsible insurance companies through the International Commission on Holocaust Era Insurance Claims to resolve all outstanding insurance claims issues. This chapter is necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California, as necessary.

Appendix E

Cal. Ins. Code § **13802** (2001)

§ **13802**. Definitions

For purposes of this chapter, the following definitions shall apply:

(a) "Holocaust victim" means any person who was persecuted during the period of 1929 to 1945, inclusive, by Nazi Germany, its allies, or sympathizers.

(b) "Related company" means any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer.

(c) "Proceeds" means the face value or other payout value of insurance policies and annuities plus reasonable interest to date of payment without diminution for wartime or immediate postwar currency devaluation.

Appendix E

Cal. Ins. Code § **13803** (2001)

§ **13803**. Central registry

The commissioner shall establish and maintain within the department a central registry containing records and information relating to insurance policies, as described in Section **13804**, of Holocaust victims, living and deceased. The registry shall be known as the Holocaust Era Insurance Registry. The Attorney General, in coordination with the department, shall establish appropriate mechanisms to ensure public access to the registry.

Appendix E

Cal. Ins. Code § **13804** (2001)

§ **13804**. Required filings by insurers

(a) Any insurer currently doing business in the state that sold life, property, liability, health, annuities, dowry, educational, or casualty insurance policies, directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945, whether the sale occurred before or after the insurer and the related company became related, shall, within 180 days following enactment of this act, file or cause to be filed the following information with the commissioner to be entered into the registry:

(1) The number of those insurance policies.

(2) The holder, beneficiary, and current status of those policies.

(3) The city of origin, domicile, or address for each policyholder listed in the policies.

(b) In addition, each insurer subject to subdivision (a) shall certify to any of the following:

(1) That the proceeds of the policies described in subdivision (a) have been

paid to the designated beneficiaries or their heirs where that person or persons, after diligent search, could be located and identified.

(2) That the proceeds of the policies where the beneficiaries or heirs could not, after diligent search, be located or identified, have been distributed to Holocaust survivors or to qualified charitable nonprofit organizations for the purpose of assisting Holocaust survivors.

(3) That a court of law has certified in a legal proceeding resolving the rights of unpaid policyholders, their heirs, and beneficiaries, a plan for the distribution of the proceeds.

(4) That the proceeds have not been distributed and the amount of those proceeds.

An insurer who certifies as true any material matter pursuant to this subdivision, which the insurer knows to be false, is guilty of a misdemeanor.

(c) An insurer currently doing business in the state that did not sell any insurance policies in Europe prior to 1945, shall not be subject to this section if a related company, whether or not authorized and currently doing business in the state, has made a filing under this section.

Appendix E

Cal. Ins. Code § **13805** (2001)

§ **13805**. Filing false information

Any insurer that knowingly files information about a policy required by this chapter that is false shall, with respect to that policy, be liable for a civil penalty not to exceed five thousand dollars ($5,000), which penalty is hereby appropriated to the department to be used by it to aid in the resolution of Holocaust insurance claims.

Appendix E

Cal. Ins. Code § **13806** (2001)

§ **13806**. Suspensions for failure to comply

The commissioner shall suspend the certificate of authority to conduct insurance business in the state of any insurer that fails to comply with the requirements of this chapter by the 210th day after this section becomes effective, until the time that the insurer complies with this chapter.

Appendix E

Cal. Ins. Code § **13807** (2001)

§ **13807**. Adoption of rules and regulations

The commissioner shall adopt rules to implement this chapter within 90 days of its effective date. The rules shall be adopted as emergency regulations in accordance with Chapter 3.5 (commencing with Section 11340) of the Government Code, and for the purposes of that chapter, including *Section 11349.6 of the Government Code*, the adoption of the rules shall be considered by the Office of Administrative Law to be necessary for the immediate preservation of the public peace, health and safety, and general welfare.